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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BY LUTHER S. CUSHING.

VOLUME IX.

BOSTON:
LITTLE, BROWN AND COMPANY.

1866.

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JUDGES
OF THE
SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.	
HON. CHARLES A. DEWEY,	} JUSTICES.
HON. THERON METCALF,	
HON. RICHARD FLETCHER,	
HON. GEORGE T. BIGELOW,	
HON. CALEB CUSHING,	

ATTORNEY-GENERAL,
HON. JOHN H. CLIFFORD.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT

FOR THE
COUNTY OF SUFFOLK, NOVEMBER TERM 1851
AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, } JUSTICES.
HON. RICHARD FLETCHER, }

GEORGE H. GARDINER & others vs. THE BOSTON AND WOR-
CESTER RAILROAD CORPORATION.

A railroad corporation, which proceeds under Rev. Sts. c. 39, § 67, after notice to the mayor and aldermen of a city, and on terms agreed upon between the corporation and the mayor and aldermen, to raise a street, that its railroad may pass under the same, acts by virtue of its independent corporate powers, and not as the agent or servant of the city; and such corporation is primarily liable, to third parties, for damages thereby caused to their estates.

A bond of indemnity taken by the city, and the appointment of a superintendent to take care of the public interests in the execution of this work during its progress, are prudent measures, which do not change the character of the work, or the general liability of the company.

The time within which damages arising from such a proceeding must be claimed, is limited to three years by Rev. Sts. c. 39, § 58.

THIS was a petition to the court of common pleas, sitting as a board of county commissioners for this county, for the assessment of damages done to the land of the petitioners by

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the respondents, by raising and grading Tremont street, in Boston, at the place where it is crossed by the track of the respondents. The case came into this court by exceptions, to the ruling of *Perkins, J.*

The respondents, on the 28th of October, 1844, by their directors, presented their petition to the mayor and aldermen of Boston, setting forth that they were desirous of making such a change of the level of Tremont street, in that part adjoining their railroad, that the travel thereof might pass above the railroad by means of a bridge; and requesting authority to build a bridge of sufficient height to allow a locomotive to pass under it, and raise the street by a grade to pass over the same. They also requested that such conditions might be agreed upon in regard to the mode of construction, and the compensation for damages to the adjoining estates as should appear to the board just and reasonable.

The board of mayor and aldermen thereupon resolved: "That the corporation be permitted, at their own expense, to raise Tremont street, in that part in which their present railroad crosses it, to a height not exceeding fourteen feet and six inches above the level of their bridge over the empty basin," on several conditions, of which the following is the only one, apparently bearing upon the present case, namely:—

"That the said corporation shall give bonds to the acceptance of the mayor and aldermen, to indemnify the city of Boston against all claims for damages to private property which may be occasioned by such alteration of the said street."

The application on the part of the petitioners to the mayor and aldermen, for an assessment of damages was made in September, 1847, and it was conceded that more than a year had elapsed after the raising of the street prior to the filing of the application.

The petition in this case was filed at the October term of the court of common pleas, 1849.

It was conceded that the raising of the street was executed by the respondents, in conformity with the requisitions made by the mayor and aldermen, under the direction of the committee of the latter on pavements, appointed for that purpose.

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On this state of facts, the respondents contended that they were not liable at all to this process, inasmuch as they acted, in the raising of the street, in subordination to, and as agents or servants of the city, and not by virtue of their independent corporate powers. But the judge overruled the objection.

The respondents further contended that, if they were ever liable for damages for the raising complained of, they were no longer so, after the expiration of one year from the completion of the work, whether viewed as an act done in subordination to the authority of the city, or in the exercise of their own corporate rights.

This objection was also overruled, and the jury found a verdict for the petitioners.

T. Hopkinson, for the respondents, cited *Parker v. Boston & Maine Railroad*, 3 Cush. 107, 116; *Heridia v. Ayres*, 12 Pick. 334, 344; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36; *Harrington v. Harrington*, 1 Met. 404; *Parks v. Boston*, 8 Pick. 218; *Brown v. Lowell*, 8 Met. 172; *Nichols v. Bertram*, 3 Pick. 345; *Goddard v. Boston*, 20 Pick. 407; *Stone v. Boston*, 2 Met. 220; *Heard v. Middlesex Canal*, 5 Met. 81; *Charlestown Branch Railroad Company v. County Commissioners*, 7 Met. 78; *St. 1831*, c. 72; *Rev. Sts. c. 39*, § 56; c. 24, § 55; c. 25, § 6; *St. 1833*, c. 91, § 2.

S. Bartlett, for the petitioners, cited *Rev. Sts. c. 39*, § 67, 68; *St. 1831*, c. 72, § 11; *St. 1833*, c. 91.

SHAW, C. J. This case arises on a petition of Gardiner and others against the respondents, for the assessment of damages done the land of the petitioners, by raising and grading Tremont street, at the place where it crosses the Boston and Worcester railroad. It was a petition to the court of common pleas, acting in the county of Suffolk as county commissioners and comes before this court, by exceptions.

The charter of the Boston and Worcester Railroad Corporation was granted in 1831, enlarged in 1832, and the general act passed the succeeding year. *St. of 1833*, c. 91.

The raising of Tremont street, on the ground of which damages are claimed in this proceeding, was done by the respondents not as part of their original structure, but in

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pursuance of the provisions of the Rev. Sts. c. 39, § 67, authorizing any railroad company which had theretofore been established, to raise or lower any turnpike or way. This provision had been adopted and acted upon by the respondents; they applied to the mayor and aldermen to make this alteration, long after the passing of the Rev. Sts., and it was granted upon certain terms set forth in the case. By acting on this license, they acceded to its terms.

At the trial, upon the facts shown, the respondents contended that they were not liable to this process, inasmuch as they acted, in raising the grade of the street, in subordination to, and as the agents and servants of the city, and not by virtue of their independent corporate powers. But this objection the presiding judge overruled, and held that the respondents were primarily liable. The court are of opinion that this direction was right. By Rev. Sts. c. 39, § 67, above cited, the corporation might raise or lower any way, for the purpose of having their railroad pass over or under the same, after notice to the selectmen, (for whom in Boston the mayor and aldermen were substituted.) It was an additional corporate power, superadded to their preëxisting powers, and, by applying to the mayor and aldermen they acted upon it. It was done at their expense, solely for their own use and benefit, and not the city's; and if it was to avoid a nuisance and danger, it was one caused by the use of their railroad over the street at the same level. By acting upon this additional corporate power, they brought themselves under the provisions of their charter, which rendered them liable to third parties for incidental damages, caused by the execution of those powers, to be assessed in the mode established by law for the assessment of similar damages. On general principles, therefore, as well as by force of the statute and the terms on which they undertook to do this additional work, for the better security of their road, the corporation was responsible, as well for incidental damages, as for the cost and expenses. The bond of indemnity taken by the city, the appointment of a superintendent to take care of the public interest, in the execution of this work during its progress, were prudent measures, taken

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ex majori cautela, which do not tend to change the character of the work to be done, or take off the general liability of the company. *Parker v. The Boston & Maine Railroad*, 3 Cush. 107.

This view substantially answers the other exception; which was, that the damages should have been claimed within one year from the time of taking the land, or from the completion of the work causing damage. For this they rely on their act of incorporation, referring to the act for assessing damages on laying out highways.

But we think that limitation is not applicable. This work was done in pursuance of the enlarged powers given by Rev. Sts. c. 39; and we think the time for claiming damages is to be governed by the same statute, § 58, which limits the time to three years. In the present case, the claim was made within three years.

Exceptions overruled, and judgment on the verdict.

THOMAS R. SEWALL vs. THE EASTERN RAILROAD COMPANY.

Where a corporation, pursuant to an act of the legislature authorizing the issue of new stock, offered such stock to the existing stockholders, in the proportion of one share of the new for every four shares of the old stock held by them, on condition that the offer should be accepted within a certain time, and that the first instalment of one third of the price of such new stock should be paid at the time of subscribing therefor; one, not an actual stockholder, who purchases of certain stockholders their rights to take the new shares, and who subscribes for the proportion of the new stock to which such rights entitle him, within the time limited therefor, but fails to comply with the condition as to the payment of the first instalment, in consequence whereof the corporation sells the shares subscribed for by him as shares not taken, cannot, by a subsequent tender of the price of such new shares and interest, maintain a bill in equity against the corporation for the specific performance of an alleged contract; this court having no jurisdiction in equity of the case, whether the shares were sold by the corporation at private sale or at public auction. Nor can such a suit be maintained as a suit against a trustee for an improper sale of trust property.

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The provisions of the Rev. Sts. c. 39, § 53, as to the mode in which shares of a stockholder in a corporation may be sold for the non-payment of assessments, do not apply to the case of new shares offered to existing stockholders, and sold because not taken by them.

THIS was a bill in equity for the specific performance of an alleged contract in writing by the respondents to issue stock to the complainant. It was heard upon the pleadings without any proofs taken.

From the bill, answer, and replication, it appeared, that by an act of the general court of Massachusetts, the respondents were authorized to increase their capital stock by the creation of not more than 5,000 shares of \$100 each; and that afterwards, in pursuance of that authority, the directors of the company passed a vote, some time in May or June, 1846, by which vote 4,500 shares of new stock were created, to be distributed to the stockholders in the company in the proportion of one new share for every four shares of the old stock, to persons holding stock at the close of business on the 30th of June, 1846, who might avail themselves of the privilege by subscribing for the new stock on or before July 10, 1846; and the new stock was to be paid for by three instalments of \$33.33 each on every share, the first payable July 10th, the second September 1st, and the third December 31st, then next; that the stockholders of the corporation, some time in the early part of July, passed a vote, that the time for subscribing for the new stock should be extended to August 1st, then next; and that, after that time, all shares and parts of shares not taken, should be sold by the company for the benefit of the shareholders who should not avail themselves of the privilege; that the complainant had not been able to see or procure copies of the two votes above mentioned, though he had applied in writing to the clerk of the corporation for a copy thereof, or leave to examine the records and take copies; the clerk, by order of the directors, having declined giving the complainant such copies, on the ground that he was not entitled thereto at the time he sought therefor; that in June and July, 1846, the complainant purchased from sundry stockholders in the corporation, for sundry valuable considerations,

the rights which they had, as owners of 584 shares of stock in the corporation, to subscribe for shares of new stock under the votes above mentioned; which rights of subscription to new stock said stockholders duly assigned to the complainant, whereby he became entitled to subscribe for 146 shares of new stock; that afterwards, during July, 1846, the complainant exhibited to William S. Tuckerman, the treasurer of the corporation, the assignments above mentioned, and thereupon subscribed for and agreed to take 146 shares of the new stock, amounting to \$14,600; that the complainant failed to pay the first instalment on the shares subscribed for by him, within the time limited by the votes of the corporation; in consequence whereof the corporation refused and still refuses to issue to him a certificate of his being the owner of 146 shares of the new stock; that, under and by virtue of a vote of the directors, passed October 8, 1846, "that the president be authorized to dispose of the new shares that were not taken by the shareholders, whenever he may deem it expedient," these 146 shares, with others, were sold, from time to time, in lots, at private sale, at 2 per cent advance, by the president of the corporation in October and November, 1846; that the treasurer, on or about November 13, 1846, informed the complainant that the 146 shares had been sold, and that he, as treasurer, would pay the complainant the premium, which, however, he declined receiving, and then protested against the right of the directors to sell the shares, and against their selling them at that price, as being far below the market price of the stock; and that the same had been sold without notice to him of such intended sale; that the complainant never received from the respondents any notice of the intended sale, or of any time or place of sale, other than is contained in the votes and publication hereinbefore mentioned; that the complainant, one or more times after August 1, 1846, requested a certificate for the 146 shares, and, at the same time, stated he would pay therefor the price subscribed for the same.

The bill alleged that the respondents, by Tuckerman, their treasurer, agreed to give the complainant credit for the assess-

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ments on the new stock, and not to call on him for payment thereof at the times specified in the votes, but to wait for the same, without giving any specified term of credit; that, when the complainant was informed by Tuckerman, that the shares had been sold, he protested that he had had no opportunity to pay for the same before the sale; that the stock was worth more than 2 per cent advance, to wit, 4 per cent advance, at the time of the alleged sale; and that he had repeatedly offered to pay for the 146 shares, but that Tuckerman and the respondents had wholly refused to receive the price of the same.

All these averments were denied by the respondents, who admitted that their treasurer did, some time, without their knowledge, consent, or ratification, propose to the complainant that, if he would pay \$5 upon each share of the new stock, and give his note for the balance of the cost thereof, payable December 31, 1846, and leave his new stock in the hands of the treasurer, he, the treasurer, would assent to receive the same in lieu of the instalments provided for by the votes; but the complainant declined to accede to the proposal when made, and stated that he could not pay \$5 on each share as proposed; and they are only informed by the bill, and no otherwise, that he is still ready to pay for the shares, and tenders payment thereof.

The respondents aver that both the votes above mentioned were published in the daily newspapers in Boston for two or more weeks.

The prayer of the bill was, that the respondents might be decreed to give the complainant 146 shares of the new stock and a certificate that he is the owner thereof, on his paying the respondents \$14,600, adding thereto lawful interest, and deducting therefrom all dividends of profits which have been declared on the new stock, and for other relief.

S. E. Sewall, for the complainant.

W. Dehon, for the respondents.

SHAW, C. J. This is a case in equity, which comes before the court upon the bill, answer, and replication, without any

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proofs taken. We can only therefore act upon the facts set forth in the bill, and expressly admitted by the answer. All those facts set forth in the bill, and denied in the answer, or not answered at all, must be considered as not proved.

The gravamen of the plaintiff's complaint is, that, after the legislature had authorized the respondents by St. 1845 c. 246, § 2, to increase their capital stock by the creation of not more than 5,000 shares, they voted to act upon that authority to the extent of creating 4,500 shares; that the corporation accepted this act, and voted to distribute the shares, so as to give one new share to each of the existing stock holders, for every four shares held by him; that the corporation passed a vote, authorizing each former stockholder to give notice of his intention to accept the offer, and take the shares on the 1st July, 1846; that by a subsequent vote of the directors, the time was extended to the 1st August, 1846; that the complainant had become proprietor, by assignment and transfer from actual stockholders, of their right to subscribe for the new stock, to the amount of 146 shares of the new stock; and that, on the 1st August, by a notice in writing, he signified his desire to take that number of shares. In looking at the votes by which the corporation accepted the act authorizing them to issue new shares, it appears that they directed an offer of the new shares to be made to the former stockholders at par, that is, at \$100 per share; but, at the same time, passed a vote, that each share should be chargeable with the payment of \$100 in three instalments, one of which was to be paid at the time, fixed as the limit of the time, of subscribing. The authority given the corporation was to issue new stock, without directing how it should be distributed or disposed of; it was left to the corporation to sell it to new proprietors for the general benefit, or to distribute it proportionably amongst the existing proprietors. In either mode, it would enure equally to the benefit of all; but the right and power of determining it was a corporate right, to be used as the corporation might decide. When, therefore, they decided to offer it to the existing proprietors, they had a right to prescribe the terms. The respondents, the corporation, insist, that, having decided

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to offer the shares in certain proportions to existing proprietors, and simultaneously passed a vote requiring one third part of the amount to be paid at the same time at which they should be allowed to subscribe for and take the stock; that such payment was a condition annexed to the offer; and, therefore, that the complainant's mere offer to take, without making the payments, was no actual taking; that the respondents were not bound by this offer; and that there was no contract for the shares. The complainant, indeed, alleges in his bill that the corporation, by Tuckerman, their agent and treasurer, dispensed with such payment, as required by the vote of the directors, and agreed to give him a credit, for an indefinite period beyond the times limited by the vote. But it is expressly denied by the respondents that their treasurer had any authority to dispense with such payment, or did, in fact, dispense with such payment, and extend to the complainant a credit for the instalments; they deny that the complainant ever did offer to make any payment, until long after the time limited for that purpose, and until after they had in fact sold and disposed of the shares to other persons, as shares not taken, and given notice thereof to the complainant. That fact, stated by the complainant, being thus denied, and there being no other evidence of it, it cannot be taken as a fact proved, and so it does not appear that the complainant ever tendered the price of the shares, in compliance with the condition on which they were offered.

But we have not thought it necessary to decide this question, however; upon the preliminary question of jurisdiction we cannot perceive how or under what head of equity this suit can be maintained.

The complainant insists that a suit in equity may be maintained, under the clause of the revised statutes, which gives the court jurisdiction in equity in cases for the specific performance of a contract. Rev. Sts. c. 81, § 8. The clause is this:—

The supreme judicial court shall have power to hear and determine in equity, amongst others, "all suits for the specific performance of any written contract."

It would seem to be rather a forced construction to hold,

that the vote of a board of directors, in disposing of additional shares, pursuant to an act of the legislature, amongst its stockholders, offering to distribute the same proportionably to all those who should signify their desire to take them, would constitute a contract in writing between the corporation and each of such stockholders.

But the complainant was not himself a stockholder, in respect to these shares, and therefore not within the terms of the vote, if that were a written contract, to be specifically enforced. He was the assignee of those who were stockholders of their rights to subscribe for and take these extra shares. The company did not object to his right to take all the benefit which such an assignment would equitably give, and offered to pay him the premium beyond the par value, for which they were actually sold, which he did not incline to accept. When, therefore, it comes to a question of strict construction of a statute, whether they have entered into such a contract as the complainant has a right to have enforced against them, we are called upon to say whether such contract has been made with him. Again, the complainant alleges that the respondents were bound to convey to him 146 shares, but that they did, in fact, without his consent, convey and transfer the same 146 shares to other persons, for a valuable consideration, without notice to those purchasers. If so, they cannot rescind those sales to others, and convey the same shares to him, and therefore cannot specifically perform that contract, if they made one, by an actual transfer of the shares. If the legislature had provided by the act that, in apportioning the new stock, each existing stockholder should be entitled to a proportionable number of the new shares, or the same thing, after the increase of the stock warranted by the legislature, had been done by a vote of the company, and if the complainant had been such an existing stockholder, in regard to the share claimed, and if he had tendered the amount of the instalments, as they became due, then he would have brought himself within the authority of *Gray v. The Portland Bank*, 3 Mass. 364. But what did that case decide? It decided that an action at law would lie: that the company, by their

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agents and officers, had done the plaintiff a wrong, for which an action on the case was the proper remedy.

In the case of *Sargent v. The Franklin Insurance Co.* 8 Pick. 30, the controversy was by persons claiming to be entitled to shares against the company; the right was regarded wholly as a legal right.

It was intimated in the course of the argument, that the bill might be sustained upon the ground that it is a suit brought to enforce a trust. We can perceive none of the characteristics of a trust in this transaction. Some authorities were cited to show that if a trustee has improperly sold out stock, constituting a trust-fund, he may be decreed to repurchase and replace it, as the most equitable and effectual mode of repairing the wrong. But it must first be determined, that the respondent is a trustee holding a trust-fund, before the court can take jurisdiction of the suit as a case in equity. Here no such trust-fund existed.

It was put forth as a strong ground of argument in the present case, that the respondents had proceeded contrary to law, in selling the complainant's shares at private sale and not at public auction, pursuant to the statute, to enforce the payment of instalments; and the case of *The Portland, Saco, and Portsmouth Railroad Co. v. Graham*, 11 Met. 1, is relied upon as an authority. But this argument, we think, is founded on a misapprehension of the law, and overlooks an obvious difference between the cases. The sale of delinquent shares, for assessments, applies to the case of an actual stockholder, one who, by entry on the books of the corporation, by the issue of a certificate or other appropriate evidence, is recognized by the company as an actual stockholder, one having a right to act and vote with other proprietors, in the concerns of the company. The mere subscription of an offer or request to become a proprietor and stockholder, not accepted or assented to by the company, does not make one a stockholder. *Gray v. The Portland Bank*, 3 Mass. 364. Indeed, the very ground of the plaintiff's complaint is, that the respondents have refused to permit him to become a stockholder, and enjoy the rights of a stockholder; that he holds an executory agreement, which

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they are equitably bound to perform, and by the performance of which he would become a proprietor of the shares in question. If he states that he is already a proprietor; that, if he had not paid his instalments, his shares would have been sold as those of a delinquent proprietor, he states himself out of court; he states that he has no occasion to seek for the performance of an executory contract, the only effect of which would be to make him the owner and proprietor of the shares in question. Whether, therefore, the defendants were right or wrong, in selling the shares in question, at private sale, as shares not taken, makes no difference as to the equity jurisdiction of the court in the case stated.

The court are therefore of opinion that this bill cannot be maintained; not because the complainant has a plain and adequate remedy at law, but because he has stated no case in which this court has jurisdiction in equity.

Bill dismissed, without prejudice.

JOHN DAVIS & others vs. THOMAS G. ATKINS & another.

In a lease of a wharf, which, after describing the boundaries, proceeds thus.

"being the same premises now in the occupancy of A. B., together with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining;" and which contains a covenant of quiet use and enjoyment; the words, "being the same premises now in the occupancy of A. B.," apply only to the wharf, and have no reference to what follows; so that the subsequent lawful filling up, by the proprietors of an adjacent wharf, of a portion of the intervening dock, constitutes no breach of covenant for which an action can be maintained.

THIS was an action of covenant, founded upon a lease executed by the parties, March 12, 1845, for five years from May 1, of the same year.

The premises were described in the lease as "a certain wharf called 'Atkins's wharf,' situated in Commercial street,

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in said Boston, and is bounded on said street fifty-nine feet, and bounded on one side by James Bartlett's land and flats, and on the other side by land and flats of James S. Wiggin, being the same premises now in the occupancy of B. Abrahams & Co., together with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining." The lease contained the usual covenants of quiet use and enjoyment of the premises during said term.

It appeared in evidence, on the trial before *Metcalf, J.*, at the sitting in October 1850, that, in the year 1808, an agreement, duly executed and recorded, was entered into by William Mills, then owning Bartlett's wharf, and Edward and Hannah Proctor, then owning Atkins's wharf, fixing the boundary line between their estates and the boundaries and dimensions of the dock between their wharves, and reducing the dock from a width sufficient to admit two vessels lying abreast, to twenty-five feet, so that only one vessel could occupy it at a time, and regulating the future use of the reduced dock by the parties.

Until about one year subsequent to the execution of the lease, the dock remained of its original width, and the occupants of Atkins's wharf enjoyed the entire use of their part of it. In 1846, the proprietors of Bartlett's wharf, availing themselves of their rights, under the agreement above mentioned, filled up the space on the south side, next to their wharf, reducing the dock to twenty-five feet, as specified in said agreement, and enforced the provisions of the agreement securing to them the joint occupancy of the dock. And from that time to the date of the writ in this case, the dock was jointly occupied by the plaintiffs and the proprietors of Bartlett's wharf.

The defendants contended that the plaintiffs enjoyed all they were entitled to under the lease, and that there was no breach of their covenants in the same; and asked the judge so to instruct the jury.

As this point of defence was not suggested until after the plaintiffs had introduced their evidence as to the damages

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sustained by them in consequence of the filling up aforesaid, by the proprietors of Bartlett's wharf, the judge, for the purpose of the trial only, ruled otherwise, and the jury returned a verdict for the plaintiffs. To this ruling the defendants alleged exceptions.

C. B. Goodrich, for the plaintiffs.

1. The instruction asked was well refused, because it was the province of the jury, under directions of the judge, to ascertain the identity and extent of the land demised.

2. It was competent for the plaintiffs to show the nature and extent of occupancy which had been, and, at the date of the lease, was enjoyed by Abrahams & Co., because, by the terms of the lease, this was made an essential element in the description of the property demised. 1 Platt on Leases, 730, 731; *Worthington v. Hyllyer*, 4 Mass. 196; *Waterman v. Johnson*, 13 Pick. 261.

J. C. Park, for the defendants.

1. The contract between the parties was in writing, and there was no pretence of fraud to justify the admission of parol testimony.

2. The sentence, "with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining," means *lawfully* belonging, for there can be no such thing as unlawful right.

3. The preceding tenant may have been trespassing upon others during all his term, or may have been enjoying an easement on the land of others by sufferance, and we should not be held to give the same privileges to his successor without special agreement.

4. The restriction of privilege complained of was matter of *record*, and therefore presumed in law to be known and public.

5. There can be no ground for the idea that the preceding description of the premises as a "wharf," with certain lateral boundaries, strengthens the plaintiffs' case; because, if it is to be construed literally, and not as a mere *descriptio loci*, it would describe an actual wharf of the width of fifty-nine feet, without any lateral docks, bounded by land and flats of

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Bartlett and land and flats of Wiggin. It is not pretended by the plaintiffs that such would be the right construction.

FLETCHER, J. The decision of this case depends wholly upon the construction of the lease, upon which the action is founded. For the plaintiffs it was maintained, that the lease conveyed to them the wharf and dock as they were at the time actually occupied by B. Abrahams & Co.; and that, by the subsequent filling up of a part of the dock, by those having a paramount title and rightful authority, the plaintiffs were deprived of a part of the premises leased to them by the defendants, for which loss, it was insisted, that the defendants were responsible in this action of covenant broken. The question therefore is, whether, upon a just construction of the lease, that part of the dock of which the plaintiffs have been deprived was conveyed to them by the defendants, with a covenant for quiet enjoyment?

The premises were described in the lease as a certain wharf, called Atkins's wharf, and, after giving the boundaries of the wharf, it is said, "being the same premises now in the occupancy of B. Abrahams & Co., together with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining." It is quite manifest that that part of the description, which says "being the same premises now in the occupancy of B. Abrahams & Co.," applies only to the wharf; it merely identifies the wharf, and has no reference whatever to the dock, or the rights, privileges, and appurtenances and flats belonging to the wharf, which are afterwards mentioned. No reference is made to the occupancy of Abrahams & Co., as identifying or defining or measuring the rights, privileges, appurtenances, flats, or docks belonging to the wharf, nor are these in any way particularly pointed out or described.

The lease conveys the wharf, particularly described by metes and bounds, together with the rights, privileges, and appurtenances, and flats belonging thereto, in the most general terms.

Whatever rights, privileges, and appurtenances, and flats and docks belonged to the wharf were granted to the plain-

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tiffs, and nothing more ; and all these they enjoyed without hindrance or interruption.

The plaintiffs would, if they had thought it important or desirable, have ascertained the precise extent of the rights, privileges, appurtenances, flats, and docks belonging to the wharf, and have had them accurately defined, limited, and set forth in the lease.

But they were willing to take the lease in the general form in which it was framed ; they have enjoyed all which was conveyed by the terms of the lease, and with that they must be content.

The defendants not having conveyed that part of the dock which has been filled up, and of which the plaintiffs have been deprived of the use, nor covenanted for the quiet enjoyment of it by the plaintiffs, there has been no breach of covenant for which this action can be maintained. The instruction, therefore, asked for by the defendants, "that the plaintiffs enjoyed all they were entitled to under said lease, and that there was no breach of their covenants in the same," should have been given, and probably would have been if it had been asked for at an earlier stage of the trial.

This decision is conclusive against the plaintiffs' right to recover ; but the entry now must be, that the verdict for the plaintiffs be set aside and a

New trial granted.

WILLIAM W. ALLCOTT vs. THE BOSTON STEAM FLOUR MILL COMPANY.

After the commencement of a contract of service between the plaintiff and the defendant, the former wrote to the latter : "I think it will be for the mutual advantage of all parties that either party have the liberty of annulling the contract by giving three months' notice of such intention in writing ;" and again, as follows : "A few days ago, I addressed a note to you, in which I suggested the making an additional clause to our contract ;" to which letters the defendants replied that they had "voted to accept the alteration or amendment proposed ;" whereupon the plaintiff immediately wrote : "I refuse to agree to the proposition

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contained in your letter ;" such correspondence does not amount to an alteration of the original contract, so as to justify a three months' notice by the defendant of their intention to terminate the contract, and a withholding of the plaintiff's salary after that time ; the plaintiff's letters containing merely a suggestion or intimation.

THIS was an action of covenant, and was tried in this court before *Fletcher, J.*, by whom it was reported substantially as follows :—

The writ bore date the 7th of July, 1848. The plaintiff declared on an indenture between himself and the defendants, dated April 25, 1845, wherein the plaintiff agrees to serve the defendants, as superintendent of their flour mill, about to be erected at East Boston, for the term of five years, and for the salary of twenty-five hundred dollars, payable semiannually, and a certain portion of the profits of the business, and subject to certain qualifications and limitations set forth in the indenture. The plaintiff avers in his declaration, that he commenced serving the defendants on the 1st day of July, 1846, in the capacity of superintendent, and so continued to serve the corporation in that capacity, doing all his duty in that respect, as expressed in the indenture, until and up to the 5th day of January, 1848 ; and that, ever since that day, he has been ready and willing, and hath continually tendered and offered to serve the corporation in the capacity of superintendent, and to do all things which belonged to him to be done, agreeably to the covenants and agreements therein contained ; but the plaintiff further avers that the corporation refused to permit him to serve them, and did, on the 5th day of January, 1848, discharge him, against his will and without his consent, from the office of superintendent, and did forcibly eject and expel him therefrom, and from the mill, store-houses, and other premises of the corporation, and still do keep and hold him out from their service.

The plaintiff also sets forth, as the breaches by him relied upon, and for which he claims damages, the omission and refusal to pay him two quarter-yearly payments of six hundred and twenty-five dollars each ; one due on the 1st day of April, and the other on the 1st day of July, 1848, and the

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omission and refusal of the corporation to pay him the share and amount of profits due to him, appearing by the books of the company, as made up by the treasurer thereof, on or about the 8th day of March, 1847; the share thereof belonging to the plaintiff, as claimed by him, being about the sum of one thousand dollars.

The defendants pleaded the general issue, and filed a specification of their grounds of defence.

To prove his case, the plaintiff gave in evidence the original indenture, the execution of which was admitted. It was also admitted by the defendants, that the plaintiff was ejected and expelled from their mill and premises on the 5th day of January, 1848, in pursuance of certain votes passed by the directors, and that they had ever since refused to receive his services.

The ground of defence was that the original contract had been subsequently altered by mutual consent, by which alteration either party might terminate their relation to each other, by a notice of three months, and that the defendants had given such notice, and that the plaintiff had been paid to such termination of the contract. To prove such alteration the defendants introduced two letters from the plaintiff to the president of the Boston Steam Flour Mill Co., as follows:—

October 19, 1847.

“I think it will be for the mutual advantage of all parties interested in the contract with me for my services, entered into on the 25th day of April, 1845, that either party have the liberty of annulling the same, by giving three months’ notice of such intention in writing.”

And again, to the same address, October 25, 1847:—

“A few days ago I addressed a note to you, in which I suggested the making an additional clause to the contract with me for my services.

“I would also make one request in relation to said contract, about which it is evident that there is some misunderstanding. I wish that my duties, marked out under that contract, may

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be *clearly and explicitly defined*. If this is done, I think that much bad feeling may be saved in future. I am extremely anxious to know just what is expected of me."

On the 7th of December, the defendants informed the plaintiff that they had "voted to accept, as an amendment of the contract with William W. Allcott, the alteration or amendment proposed by him, in his letter, of the 19th of October last, to wit,—“that either party have the liberty of annulling the same, by giving three months' notice of such intention in writing;—and the alteration is considered as made, and may be indorsed upon the contract at once."

The defendants also introduced Elijah D. Brigham as a witness, who stated that, in October, 1847, he was general agent of the defendants, and that in that month, either on the 15th or 16th, as he thought, an informal meeting of several of the directors, viz: Messrs. Sturgis, Lombard, Hendee, and Soule, was held at the lodgings of the witness, at the Albion, at which the plaintiff and witness were present; that, at that interview, the plaintiff addressed himself to those of the directors present, and stated that, to show he had only the best interests of the concern in his mind, he would propose an addition to his contract for services,—that he would propose that either party should have the right to annul it, by giving the other three months' notice. One of the directors said it struck him favorably, and desired the plaintiff to make his proposition to the directors in writing. All were pleased with the proposition. The witness thought the plaintiff said he would make it in writing. The plaintiff in reply to the defendants' letter of the 7th of December, wrote on the 10th to them, saying: "Under existing circumstances, I am not disposed to agree to any modification of the contract existing between us. To avoid all mistake, I wish to be understood as saying that I refuse to agree to the proposition contained in your letter above referred to."

The plaintiff also put into the case the vote of the directors of the corporation, passed December 11, 1847:—

"That Messrs. Hendee and Soule be a committee to confer with Mr. Allcott, and see if an arrangement can be made with him to give up his office as superintendent."

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Richard Soule, in behalf of the plaintiff, testified that he was one of the directors of the defendants; that, in pursuance of the vote of the directors above mentioned, Mr. Hendee and himself had an interview with Allcott, at witness' dwelling-house; their object was to obtain from Allcott the terms upon which he would quit his post; that they discussed the matter, and Allcott agreed to furnish to them in writing the terms upon which he would do so.

At the suggestion of the judge, it was agreed that the case should be submitted, upon the foregoing evidence, to the whole court.

If the court shall be of opinion that the evidence is sufficient to show, and does show, a change or modification of the contract, and that covenant will not lie to enforce any claim of the plaintiff for compensation arising subsequently, the plaintiff is to be nonsuit; otherwise, the case is to be sent to an assessor or master, to determine whether any, and if any, what sum is due to the plaintiff, under such instructions as the court may give, and judgment for the plaintiff or defendants is to be entered upon such report, as confirmed by the court.

H. H. Fuller, for the plaintiff.

There was no *offer*, or *proposal*, or *promise*, on the part of the plaintiff, to make any change or modification; he merely suggests the subject for consideration; see his letters to Lombard, and Brigham's testimony. The letters were addressed to Lombard, the president of the corporation, and not to the directors, as were his communications designed for the corporation.

S. Bartlett, for the defendants.

The indenture between the plaintiff and defendants, although under seal, may be modified, changed, or altered by parol. *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 429, 436; *Cummings v. Arnold*, 3 Met. 486.

The letters between the parties do constitute a contract between them, and alter the indenture aforesaid. *Kennedy v. Lee*, 3 Merivale, 441; *Mactier v. Frith*, 6 Wend. 103, 116, 122; *Averill v. Hedge*, 12 Conn. 424; *Adams v. Lindsell*, 1 B.

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& Ald. 681; *Foster v. Boston*, 22 Pick. 33; *Dunlop v. Higgins*, 1 Clark & Finnelly, (N. S.) 381.

FLETCHER, J. The plaintiff in this action, which is covenant broken, declares upon an indenture between himself and the defendant corporation, bearing date the 25th day of April, A. D. 1845, in which the plaintiff agrees to serve the said corporation, as superintendent of their flour mill, about to be erected, for the term of five years; for which services the corporation agree to pay him a salary of twenty-five hundred dollars, payable semi-annually, and also a certain portion of the profits of the business, subject to certain qualifications and limitations, set forth in said indenture. The plaintiff alleges a performance and a tender of performance of all things which belonged to him to perform, agreeably to the covenants and agreements contained in said indenture.

The plaintiff further avers, that the corporation refused to permit him to serve them, and did, on the 5th day of January, 1848, discharge him, against his will and without his consent, from said office of superintendent, and did forcibly eject and expel him therefrom, and from the mill, storehouses, and other premises of the corporation, and still do keep and hold him out from their service.

The plaintiff also sets forth, as the breaches by him relied upon and for which he claims damages, the omission and refusal of the corporation to pay him two quarter-yearly payments, of six hundred and twenty-five dollars each, and the omission and refusal of the corporation to pay him the share and amount of profits due to him.

The defendants set up, as a defence to the action, that the contract between the parties, as contained in the original indenture, had been changed by mutual agreement, so that either party had a right to terminate the contract, under the indenture, by giving the other three months' notice; and that the defendants, in pursuance of the provision of the contract as thus changed, had given the three months' notice, and had thus terminated the contract, so that the plaintiff was not entitled to the wages and profits claimed in this suit.

To show the alleged alteration in the contract, two letters

of the plaintiff were introduced, which the defendants insisted made an agreement on his part, that the contract should be altered as alleged, so that either party might terminate the same, by giving three months' notice to the other. The defendants also introduced a vote of the corporation, agreeing on their part to such alteration, and alleged that the contract had thus been altered by the mutual agreement of the parties.

The plaintiff alleged that his letters, introduced by the defendants, did not amount to an agreement on his part, that such an alteration should be made in the contract, but only contained a suggestion that it might be for the advantage of the parties to make such an agreement; thus inviting the defendants to a conference on the subject, but that no conference was had, and no agreement was ever in fact made.

The case, therefore, turns upon the construction of the plaintiff's letters; whether they contain a suggestion merely, opening the way to a negotiation between the parties, or whether they contain a definite agreement on the part of the plaintiff to the alteration proposed; so that, when the same was agreed to by the corporation, and notice given to the plaintiff, a binding agreement between the parties was completed, nothing more having been done or said by either party.

Upon examining the letters, it seems too clear for controversy that they contain merely an intimation or suggestion, but nothing like an agreement. In the first letter, which is dated October 19, 1847, the plaintiff says: "I think it would be for the mutual advantage of all parties" that either party have liberty to terminate the contract, &c. This is merely the expression of an opinion. If the parties had come together, the plaintiff might have insisted upon various terms, conditions, and considerations, before he would have entered into an agreement.

But in his next letter, which is dated October 25, 1847, the plaintiff says: "A few days ago, I addressed a note to you, in which I *suggested* the making an additional clause to the contract with me for my services."

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In this letter, the plaintiff declares that what was said in his first letter was intended only as a suggestion. In this letter the plaintiff also suggests certain other things as desirable to have done, in amendment of the original contract in the indenture.

The defendants received this last letter more than a month before they acted on the subject; and, therefore, well knew that what was said in his letters was meant by the plaintiff as a suggestion merely, and not as an agreement. The defendants, by treating as an agreement what the plaintiff expressly told them he intended merely as a suggestion, could not make it an agreement. To establish the agreement set up in defence, it was necessary to show the concurrence of both parties; but it does not appear that the plaintiff, on his part, ever entered into any such agreement, so that the defence wholly fails.

It was maintained on the part of the plaintiff, that, even if his letters contained an agreement on his part, he was released from it by the delay on the part of the defendants in acting on the subject. But it is not necessary to consider this question.

The judgment is, that the suit is well maintained, and the case will be sent to an assessor, to ascertain the amount of damages. See *post*, 376.

ERNEST SCHOPMAN vs. THE BOSTON AND WORCESTER RAILROAD CORPORATION.

A railroad company, receiving upon its track the cars of another company, placing them under the control of its agents and servants, and drawing them by its locomotive, over its own road, to their place of destination, assumes towards the passengers coming upon its road in such cars, the relation of common carriers of passengers, and all the liabilities incident to that relation.

The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such contract, are the same, whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company.

THIS was an action on the case, to recover damages of the defendants, for an injury alleged to have been sustained by the plaintiff's wife, while being transported as a passenger over the defendants' railroad. It was tried in this court before *Bigelow, J.*, by whom it was reported in substance as follows:—

The writ avers, that the defendants received the plaintiff's wife into their cars at Worcester, to be transported as a passenger from that place to Boston, for a certain price paid them by the plaintiff; and that, while on the passage, she met with the injury complained of.

At the trial, it appeared that the plaintiff and his wife came upon the defendants' railroad, on the day of the accident, in a car belonging to the Western railroad, which made part of a train which had come from Springfield that morning; that the plaintiff bought no ticket of the defendants, and paid them no money for his own or his wife's passage, except as hereinafter stated; but, at some stage of the route between Worcester and Boston, surrendered to the defendants' conductor tickets which he had purchased of the Western railroad corporation, at Albany or Springfield, entitling himself and wife to a passage over the defendants' railroad from Worcester to Boston, which tickets were distinguished from Western railroad tickets by their color, and for which the conductor gave him Boston and Worcester railroad checks. It further appeared that, by an arrangement entered into between the defendants and the Western railroad corporation, the latter corporation sold tickets to passengers, entitling them to a passage over the Western railroad, and also over the railroad of the defendants to Boston, and that the ticket of the plaintiff's wife was sold in pursuance of this arrangement; that the defendants received a certain portion of the price paid to the Western railroad corporation for each ticket so sold; that the regular fare or price of a passage in a first class car from Worcester to Boston was one dollar and twenty-five cents, and two thirds of that price in a second class car, for passengers going only from Worcester to Boston; but that for passengers who purchased tickets under

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said arrangement to go over the Western railroad, and also over the railroad of the defendants, the Boston and Worcester railroad corporation received one dollar and ten cents for first class passengers, and two thirds of that price for second class passengers. It also appeared that the Boston and Worcester railroad corporation took passengers who had purchased tickets under said arrangement from the Western railroad, in the cars of the Western railroad, and conveyed them to Boston, and took the cars back.

It further appeared that the car in which the plaintiff and his wife were riding, and a portion of the remainder of the train, were Western railroad cars, and were drawn by the defendants' locomotive, in connection with other cars belonging to the defendants, on the route of the train, to Boston, where it met with the accident.

On this state of facts, the defendants contended that the relation of carrier and passenger, as alleged in the plaintiff's suit, did not subsist between them and the plaintiff's wife, but that they were responsible only to the Western railroad corporation for any want of care in transporting the Western railroad corporation's passengers; and that the measure of care, if any, which they were bound to exercise towards the plaintiff's wife, was only that of ordinary diligence.

But the presiding judge ruled, that, upon these facts, the relation of passenger and carrier did subsist between the plaintiff's wife and the defendants, and that they were bound to the exercise of care and caution, as common carriers for hire.

The defendants further asked the instructions of the judge to the point that, by the provisions of their charter and the general laws, they stood towards the public and the Western railroad corporation in the relation merely of proprietors of a toll-way, accountable for no more than ordinary care in the construction and maintenance of their track or road-bed; supposing any accident to have occurred by reason of a defect in said track or road-bed, to passengers passing over their road in cars which they were compelled by law to draw for a toll or compensation; and that, if the jury should find that the

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plaintiff's wife suffered injury only in consequence of a defect in their track, or the rails appurtenant to it, then they would not be responsible in this action, if guilty of no want of ordinary care.

But the presiding judge instructed the jury, that the defendants stood in the relation of common carriers of passengers towards the plaintiff's wife, and were responsible as such for any want of care and caution in the management and maintenance of their track and rails.

Full instructions were given as to the legal duties and responsibilities of common carriers of passengers, to which no exceptions were taken.

In reply to an inquiry from the judge, the jury, who found a verdict for the plaintiff under these instructions, stated that they based it solely upon the negligence of the defendants, in permitting any elevation of the rails to exist, which gave rise to the accident.

S. Bartlett, for the plaintiff, cited *Angell on Common Carriers*, §§ 67, 98, 587; *Cutler v. Winsor*, 6 Pick. 335; *Abbott on Shipping*, 46, 47; *Sproul v. Hemmingway*, 14 Pick. 1; *Ingalls v. Bills*, 9 Met. 1; *New Jersey Steam Navigation Co. v. The Merchants' Bank*, 6 How. 344; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251. The defendants were liable for the highest degree of care, and for any injury arising from a want of such care, *case* would lie against them by the passengers. See *Grote v. The Chester and Holyhead Railway Co.* 2 Welsby, Hurlstone & Gordon, 251.

T. Hopkinson, for the defendants.

The relation of common carrier of merchandise does not exist between the plaintiff and defendants. *St.* 1845, c. 191, § 2; *St.* 1831, c. 72, § 14; *Humphreys v. Reed*, 6 Whart. 435; *Caton v. Rumney*, 13 Wend. 387; *Pennsylvania, Delaware, & Maryland Steam Navigation Co. v. Dandridge*, 8 G. & Johns. 248; *Alexander v. Greene*, 3 Hill, 9.

There is no contract, express or implied, between the plaintiff and defendants. The defendants are obliged by law to carry the passengers, for a compensation to be paid by the Western railroad corporation. *St.* 1845, c. 195.

The liability of the Western railroad corporation extends to Boston. *Weed v. Saratoga & Schenectady R. R. Co.* 19 Wend. 534; *Watson v. Ambergate, Nottingham & Boston R. Co.*, 3 Eng. Law & Eq. 497; *Muschamp v. Lancaster & Preston Junction R. Co.*, 8 M. & W. 421; *St. John v. Van Sautvoord*, 25 Wend. 660; *Van Sautvoord v. St. John*, 6 Hill, 157.

As to the liability of common carriers of passengers, see *Camden & Amboy R. R. Co. v. Burke*, 13 Wend. 626; *Laing v. Colder*, 8 Barr, 479.

The liability of proprietors of a road merely is for neglect of common and ordinary prudence. *Lobdell v. New Bedford*, 1 Mass. 153; *Reed v. Northfield*, 13 Pick. 94; *Humphreys v. Reed*, 6 Whart. 435; *Caton v. Rumney*, 13 Wend. 387; *Alexander v. Greene*, 3 Hill, 9.

The common law liability being one of great rigor, should not be extended to new cases. *Boyce v. Anderson*, 2 Peters, 150.

DEWEY, J. It is not contended, on the part of the plaintiff, that the defendants are chargeable to the extent of common carriers of merchandise; but it is insisted that there existed the relation of carriers of persons, and that all the liabilities incident to that relation attached to the defendants, as respects the wife of the plaintiff, while being transported from Worcester to Boston. The plaintiff's wife, for an injury to whom this action is brought, did not procure her original ticket for a passage from Worcester to Boston at any station office of the Boston and Worcester railroad, but at some point on the Western railroad; and at one of their offices, purchased a through ticket from Springfield, or some place further west, to Boston, entitling her to pass over the Western railroad and the Boston and Worcester railroad. Whether, at the time of the purchase of the ticket, she received a Boston and Worcester railroad ticket, or only a through ticket to Boston, however that may be, she became, before reaching Worcester, by exchange of ticket, as practised by the conductors, the holder of a ticket of the Boston and Worcester railroad, and one entitling her to a passage from Worcester to Boston, and received by the conductor as such.

It is, in our view, quite immaterial where she may have obtained this Boston and Worcester railroad ticket. If the defendants adopt this mode of furnishing their tickets to agents to sell elsewhere, either at other railroad stations, or in connection with stages, or if they agree with another contiguous railroad company, that a ticket be issued which is to entitle the purchaser to pass on both roads, and which, upon being shown to the conductor of the Boston and Worcester road, is to have all the benefits of ordinary tickets, and to be received by him as such ticket, it is, to all intents and purposes, the same thing to the traveller as a ticket purchased at the office of the Boston and Worcester railroad; and the rights of the passenger and the liabilities of the company are the same as if the ticket had been purchased at the office of the Boston and Worcester railroad company, for the mere passage from Worcester to Boston.

Whether the Western railroad might also be charged for this injury, happening on the Boston and Worcester road, if the plaintiff had elected to resort to that company in the first instance, and if the facts had been that the Western railroad had sold to the plaintiff a through ticket, so called, we have no occasion to decide, as no such action is before us. The present case does not raise that question.

It is, however, urged that the liability of a passenger carrier ought not to attach to the Boston and Worcester railroad, as to passengers occupying seats in cars owned by the Western railroad, which pass from Worcester to Boston. To present this point fully, however, it is to be borne in mind, that, although a car of the Western railroad is thus used by the passengers arriving by the Western railroad on their further transit to Boston, yet this car is at once transferred to the Boston and Worcester railroad, is attached to their engine, and is wholly committed to the supervision and control of the Boston and Worcester road, their agents and conductors, and the control and agency of the Western railroad is wholly withdrawn. The conductor of the Boston and Worcester road demands of each passenger in these cars the usual fare for a passage to Boston, or a ticket entitling him to the same

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and, as is stated in the case, on through tickets, entitling to a passage from Boston to Albany or Albany to Boston, the defendants are allowed, by mutual arrangement, for each passenger, a stated and stipulated sum for carrying them over their road.

It is also further found, as a part of the facts of the present case, that the injury sustained by the plaintiff's wife was not in any degree attributable to any defect in the car used on that occasion. The whole ground of complaint, for which this action is instituted, is for neglect of duty on the part of the defendants in their railroad track, which is alleged to have been out of proper repair; and by reason of negligence in this respect solely, the injury was sustained by the plaintiff's wife.

It was urged further, on the part of the defendants, that, as the default complained of was a defect in the road track, the defendants should only be held responsible for ordinary care and diligence, agreeable to the rule applicable to common highways.

This point might be more appropriately presented in a case of negligence, as to the road track of one corporation used by another, paying tolls for the use, but running their own engine, cars, &c., and all under the exclusive control and direction of conductors and servants of their own. The question as to the degree of care required as to the road track would, in such a case, directly arise; and the court might be called upon to say, whether the care and diligence demanded of a railroad corporation, as to its road track, could reasonably be deemed less, considering the peril to life and limb, which would be occasioned by negligence in that respect, than that high degree of care and diligence which the law requires of all carriers of persons; that is, whether the law would not require the highest practical care and oversight, as to safety of the road track, and exonerate the railroad company only from liability for injuries resulting from those latent defects which the most vigilant care and oversight could not guard against.

But, in the view we have taken of the present case, the

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defendants were the carriers of the plaintiff's wife, and, as respects her, liable to all the duties of common carriers of persons. These duties, as respects a railroad carrying persons upon their own road, would require a suitable road, with rails properly laid, as well as suitable cars, engine, conductors, &c., the whole combined making the mode of conveyance for which the defendants were paid, and as to which their liability attached. In the various cases that have been the subject of judicial investigation, where damages have been claimed for injury to the person while travelling upon the railroad, we believe the rule has always been adopted, of holding the parties to the highest responsibility that attaches to carriers of persons.

In the present case, there is nothing to take it out of the general rule. The result is, therefore, that judgment must be entered on the verdict for the plaintiff.

Judgment for the plaintiff.

JAMES STEARNS vs. ADIN HALL.

Evidence is admissible, to show that the time of performance of a written contract within the statute of frauds, has been enlarged by a subsequent oral agreement.

THIS was an action of *assumpsit*, with the usual money counts, on the following written agreement, under date of "Boston, May 20, 1843," addressed to the plaintiff and signed by the defendant: "Sir,—I will sell you the house No. 42 Myrtle street, on the 1st day of October next, if you will pay what it has and may cost me, with my charges for the same."

The case was tried in this court at the March term 1850, before *Fletcher, J.*, and reported by him.

At the trial, the plaintiff gave in evidence the above agreement and a deed of the same premises from himself to the defendant, dated April 29, 1843. He also offered several letters written to himself by the defendant, the admission of

which, though objected to by the defendant, was allowed by the presiding judge. The following witnesses were then called by the plaintiff and were allowed to testify, notwithstanding the defendant's objection.

Edmund Hooper testified, that he carried letters between Mr. Stearns and Hall, when Stearns was in jail, and was present when the deed was made. Hall was to act as agent, and Stearns was to have his house back on paying Hall what he paid Mr. Dexter, and for repairing the house and his commission in six months. Stearns wished Hall to give him a writing to this effect. Hall said he would not give him one there in jail, but that he would give him a writing, if he would call at his office when he came out. Stearns thereupon executed the deed. He came out of jail that day.

Enoch Martin testified, that Mr. Stearns employed him to sell the house. I called on Hall about a week before the time mentioned in the written contract was out. Hall said we need not distress ourselves; and if we could find a purchaser within thirty days, he would convey the estate. I got Mr. Richards. I brought Richards and Stearns together. Stearns at first refused Richards's offer. Richards afterwards informed me that Stearns had accepted his offer, and wished me to see Hall. I told Hall, Richards had bought the estate. I called on Hall for a deed. He said Stearns had not been there. I called again, and he said he could not get a settlement with Stearns, and he would do no more about it. Hall gave further time; I think thirty days. I got Richards within the time, and notified Hall. I don't recollect the exact time.

Reuben Richards testified, that he purchased the estate of Mr. Stearns, for about \$5,000. I purchased it through Mr. Martin. Hall delivered this deed (the deed drafted by Hall, dated October 9, 1843, and not signed, being shown to the witness) to me. I called on him with the money in my hand. Mr. Stearns was with me. Mr. Hall replied, he should do no more about it. I thought I had got a good bargain. Hall refused absolutely to do any thing about it. This was in October, 1843, about the date of the deed Hall drafted. I think I carried \$5,000 in money. I presume I told Mr. Hall

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I was prepared to pay him the money, as I went for that purpose. When I went to pay the money, Stearns was with me.

The defendant introduced no evidence, but contended that the evidence of the plaintiff contravened the statute of frauds, and was not admissible by the rules of evidence. But the judge ruled that it was admissible, and did not contravene the statute of frauds.

The case, thereupon, was taken from the jury, by consent of parties, to be reported to the full court; if the court shall be of opinion that the ruling was right in point of law, and if the evidence was competent to go to the jury to maintain the plaintiff's case, the defendant to be defaulted and an assessor appointed to ascertain the amount the plaintiff shall recover under such rules and instructions as the court shall give; otherwise, the plaintiff to be nonsuited, or the case sent to a jury for trial, as the court shall deem the rights of the parties require.

E. M. Bigelow, for the plaintiff.

1. The evidence establishes the fact, that the time of performance fixed in the written contract was waived or extended, and that, within the extended time, the plaintiff offered to do, and did, all that was required of him.

2. The terms of a written contract may be varied by a subsequent parol contract, though the original contract falls within the statute of frauds. Rev. Sts. c. 74. *Cummings v. Arnold*, 3 Met. 486, and cases there cited; *Cuff v. Penn*, 1 M. & S. 21; *Blood v. Hardy*, 3 Shepley, 61, and cases cited; *Borden v. Borden*, 5 Mass. 69; *Swan v. Drury*, 22 Pick. 485; 1 Greenl. Ev. § 304, and cases cited; *M'Combs v. McKennan*, 2 Watts & Sergeant, 216; *Fleming v. Gilbert*, 3 Johns. R. 528; 3 Starkie Ev. 1050; Coke Lit. § 343 *et seq.*; *Keating v. Price*, 1 Johns. Cas. 22; *Ratcliff v. Pemberton*, 1 Esp. R. 35.

C. A. Welch, for the defendant.

Where the original contract is for the sale of lands, and thus within the first section of the statute of frauds, and is subsequently varied in its terms by a parol contract, a party cannot be held liable for a breach of the contract as thus

varied. *Goss v. Nugent*, 5 B. & Ad. 58; *Stowell v. Robinson*, 3 Bingham, N. C. 928; *Stead v. Dawber*, 2 Perry & Davison, 447; *Marshall v. Lynn*, 6 M. & W. 109; *Blood v. Goodrich*, 9 Wend. 68.

This case is not within the principle decided in the case of *Cummings v. Arnold*, 3 Met. 486; because the defendant, in that case, merely relied upon the parol agreement, as a matter of defence to a suit brought on a written contract; and here the party relying on the parol agreement seeks to charge the defendant upon it in direct contravention of the statute.

FLETCHER, J. As a general rule, in a case of a simple contract in writing, oral evidence is admissible to show a subsequent oral agreement to enlarge the time of performance, or to vary any other terms of the contract, or to discharge and annul it altogether. This rule of law is well established by numerous authorities.

Whether or not this general principle is applicable at all, and if so, to what extent, to written contracts within the statute of frauds, is a question which has been frequently and largely discussed; and the adjudged cases upon the subject, both English and American, are numerous and very conflicting. This conflict of decisions has occasioned much difficulty and embarrassment.

In the case of *Cummings v. Arnold*, 3 Met. 486, this subject was very fully considered, and the cases examined by this court. In that case the court say: "The principal design of the statute of frauds was, that parties should not have imposed on them burdensome contracts, which they never made, and be fixed with goods which they never contemplated to purchase. The statute, therefore, requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate the performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. This is left to be decided by the rules and principles of law, in relation to the admission of parol evidence to vary the terms of written contracts. We have

no doubt, therefore, that accord and satisfaction, by a substituted performance, would be a good defence in this action."

The principle thus established is decisive against the defence in the present action.

In coming to the above decision, the court adopted the doctrine of the case of *Cuff v. Penn*, 1 M. & S. 21; in regard to which, after examining other cases, the court say: "But the principle on which the case of *Cuff v. Penn* was decided is, in our judgment, more satisfactory, and better adapted to the administration of justice in this and similar cases."

The case of *Cuff v. Penn* was substantially like the present case. That was an action of *assumpsit* against the defendant, for not accepting a quantity of bacon according to his written contract, which was within the statute of frauds. The defence to the action was, that the bacon was not delivered within the time specified in the written contract; to which the plaintiff replied, and proved that the time of delivery, expressed in the written contract, was extended by the parties by a subsequent oral agreement, and that the plaintiff tendered the bacon to the defendant within the substituted time. The court held that it was competent for the plaintiff to show that the parties, by a subsequent oral agreement, substituted a time for the delivery of the bacon different from that mentioned in the written contract, and that he delivered or offered to deliver it, within the substituted time, and the plaintiff had a verdict and judgment.

This rule, which was adopted by this court in *Cummings v. Arnold*, fully sustains the ruling at *nisi prius* in this case, and entitles the plaintiff to judgment. The present case strongly illustrates the propriety and necessity of the rule thus established. From the evidence in the case, it must be assumed that the plaintiff would have paid the money within the time limited in the written contract, if the defendant had not orally agreed to substitute another time, and the plaintiff, in fact, tendered the money within the substituted time.

The defendant, therefore, by his own act, by orally agreeing

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to receive the payment at another substituted time, prevented the plaintiff from making the payment within the time limited in the original contract. Though the plaintiff was ready, and offered to make the payment within the substituted time, yet the defendant, notwithstanding his oral agreement, refused to receive the money, and now sets up the non-performance by the plaintiff within the time originally limited, which the defendant himself has by his own act occasioned, as a defence to the plaintiff's claim in this action. This defence cannot be maintained.

The conclusion is, that the evidence offered by the plaintiff at the trial was admissible, and competent to go to the jury to maintain the plaintiff's case; and the defendant, therefore, must be defaulted, and an assessor appointed according to the report, to ascertain the amount to which the plaintiff is entitled, for which judgment will be entered.

Defendant defaulted.



NAHUM S. LUND & wife vs. THE INHABITANTS OF TYNGSBOROUGH.

In an action against a town, for injuries received in consequence of a defect in a highway, the answer of a witness who was asked the condition of the road, that "there was a bad place at the side of the road; there had been a culvert put across. The condition of it was bad. At the mouth of the culvert, it was a steep right down; a culvert that I thought a dangerous place;" is admissible in evidence, as it describes the actual condition of the road within the personal knowledge of the witness, and is not an expression of opinion merely.

Where the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, form a part of the *res gestæ*, and are admissible in evidence.

Declarations of a physician, made at the time of his examination of an injury, offered to show the nature and extent of the injury,—the examination itself, detached from the declarations, being wholly unimportant and immaterial,—are inadmissible in evidence, not being a part of the *res gestæ*; although the physician be dead at the time of the trial.

THIS was an action on the case, tried in this court before *Fletcher, J.*, in which the plaintiffs sought to recover damages for an injury alleged to have been received by the female plaintiff, in consequence of a defect in a highway in the town of Tyngsborough, which the defendants were legally bound to keep in such condition that the same might be safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the year. The alleged defect consisted in a hole left open at the end of and extending around the mouth of a culvert, unguarded by any railing or covering.

There was evidence that the culvert extended across the road, and was covered with flat stones and earth, for a space of about twenty-three feet, and that the hole complained of was about six feet from the wheel rut ordinarily travelled, nearest to it; that there was no covering or railing over or around this place, or any thing to warn travellers of the existence of such a hole. As to the particular admeasurements of the size and depth of the hole, there was some variance in the testimony. It was represented to be from one to three feet deep, and from one foot six inches to six feet in length, and from ten inches to four feet in width.

The plaintiffs offered the deposition of John Kendall, that "there was a bad place at the side of the road, where they put in the culvert.—There had been a culvert put across. The condition of it was bad. At the mouth of the culvert, it was a steep right down."

The plaintiffs also offered the deposition of one George Wright, "that there was a bad place near there; a culvert that I thought a dangerous place. I should judge it was about eighteen inches deep and three feet wide, and I should think not far from six feet from the cart rut. It was a common across the road and end open."

The above answers were, on the trial, objected to by the defendants' counsel, on the ground that they conveyed an opinion. The counsel for the plaintiffs contended that they conveyed no opinion as to whether there was a defect in the

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road, but were simply descriptive expressions used by the witness, and qualified and explained by him.

The judge overruled the objection, and admitted the testimony.

The plaintiffs also introduced the deposition of one Lydia Kendall, in which were the following interrogatories and answers:—

Int. 9. "At the time when he (the doctor) was called, and while engaged in such examination, what did he say concerning such injury, its nature, and extent?"

Ans. 9. "I heard him say that it was a very serious injury, and it would be three months, if not longer, before she would have the use of her limb."

Int. 11. "At the time when (if ever) the doctor was called to Mrs. Lund, when she was injured, what did he say was the injury to the same?"

Ans. 11. "He said it was more injured than though the bone was broken; that the ligaments were torn from the bone, and broken."

The defendants objected to the admission of these answers, upon the ground that they were hearsay evidence. It was admitted that Dr. Pierce, the surgeon mentioned in the deposition of Lydia Kendall, had died since the accident complained of, and previous to the taking of the deposition. The counsel for the plaintiffs urged the admission of his sayings and acts at the time of the accident, as part of the *res gestæ*.

The judge overruled the objection, and admitted the testimony. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

A. W. Farr, for the defendants, as to the inadmissibility of the answers of John Kendall and George Wright, cited 1 Greenl. Ev. §§ 440, 441; *Gibson v. Williams*, 4 Wend. 320; *Lester v. Pittsford*, 7 Vt. 158; and, to show the doctor's declarations inadmissible, 1 Greenl. Ev. §§ 124–126; *Gray v. Goodrich*, 7 Johns. 95; *Haynes v. Rutter*, 24 Pick. 242; 1 Starkie Ev. 47.

G. F. Farley, for the plaintiffs.

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FLETCHER, J. It was maintained, on the part of the defendants, that the answers to the twelfth and thirteenth interrogatories in the deposition of John Kendall, and the answer to the seventh interrogatory in the deposition of George Wright, were improperly admitted in evidence, because they merely expressed opinions of the witnesses, who were not experts, and were not statements of any facts. But the court do not so understand the testimony. The witnesses are not asked their opinion as to the sufficiency or insufficiency of the road. But the inquiry was as to the actual condition of the road in point of fact, and as to what the witnesses knew, not what was their opinion on this subject. The answers of the witnesses describe the actual condition of the road as within their personal knowledge, and are not expressions of opinion merely.

The answers are merely descriptive — in very general terms to be sure — of the defective state of the road; but the defendants might, if they had thought proper to do so, have required the witnesses to state in detail in what particulars the road was bad; and, in the answer of the witness Wright to the eighth interrogatory, the defect in the road is particularly described. But this general form of expression does not warrant the exception that the witnesses give opinions merely, and do not state facts. This exception, therefore, is not sustained in point of fact.

The only remaining exception is that taken to the admission in evidence of several answers in the deposition of Lydia Kendall. In these answers, the witness states that the physician, who was called to Mrs. Lund after she received the injury for which this suit was instituted, said that it was a very serious injury, and it would be three months, if not longer, before she would have the use of her limb; and that he further said, her limb was not broken; "he said it was worse injured than though the bone was broken; that the ligaments were torn from the bone, and broken." It does not appear by the report how long it was after the accident happened when these declarations were made; it only appears that they were made at the time when the doctor was called to

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Mrs. Lund, and examined her after she was injured. The object of introducing these declarations was, to show the nature and extent of the injury. The defendants objected to the admission of the answers of the witness, containing these declarations of the physician; but they were admitted, and to this admission exception is now taken. The ground of the exception is, that the declarations of the doctor were hearsay merely, and, as such, were not admissible. The fact, which appears in the case, that the doctor had deceased at the time of the trial, does not affect the legal principle. It is no sufficient reason for receiving hearsay, that the person is dead; and, therefore, that is the best evidence which can be produced. It may be unfortunate for the party to have lost his evidence, but that furnishes no good reason for the admission of incompetent testimony.

To admit hearsay would be to admit evidence without the sanction of an oath, without cross-examination, and without those tests of truth which the law in general so wisely requires. There must, of necessity, be some general rule or principle of the law on the subject; and if mere declarations should be admitted in one case, they must be in every case; and if the declarations of one person are admitted, the declarations of every other person must also be admitted, and the trial of issues would be embarrassed, and justice obstructed and defeated by innumerable unfounded and conflicting declarations and statements. Parties would be defrauded of their rights and of their property by loose, inconsiderate, or ill-disposed assertions and remarks. The danger that casual observations would be misunderstood, misremembered, and misreported, increases the number and force of the objections to the admission of hearsay.

The law, therefore, in its wisdom, rejects hearsay. If the declarations in the present case are to be regarded as of this character, they were, beyond all question, improperly admitted.

But it is maintained, on the part of the plaintiffs, that these declarations should be regarded as a part of the *res gestæ*, and thus admissible as original evidence. This is the main question in this case.

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It is a well established principle of the law, that declarations which form a part of the *res gestæ*, and are to be considered as a part of the transaction, do not come under the head of hearsay, but are admissible as original evidence.

This is a settled general rule ; but, like other general rules, its application to particular cases is often attended with much doubt and difficulty. But it is wholly impracticable to bring this class of cases within the limits of any clearly defined and positive rules. There are, however, certain principles and tests, which are simple and intelligible, by which the admission of this kind of evidence must be determined. Its admission is not left to the discretion of the presiding judge, as has been sometimes supposed ; but is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment ; and errors of judgment in this case, as in other cases, may be examined and corrected. If it were matter of discretion merely, there would, of course, be no fixed rules and no uniformity of decisions ; and the exercise of this discretion would not be subject to exception and revision and correction.

In a branch of the law of evidence of so high importance, and under which questions are so constantly arising in practice as that in regard to the admission of declarations not made under oath, nor in presence of the parties in interest, it is extremely desirable that the law should be as clearly defined, and its principles as fully illustrated and explained, as may be practicable. Questions of this nature have frequently arisen in this court ; but the decisions have been confined to the particular cases in hand, without any extended examination of the general subject.

It is proposed, in the present case, to consider the subject somewhat more at large, and to endeavor to set forth and illustrate, with some particularity, the principles and tests by which this class of questions must be determined.

If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it,

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it is not admissible in evidence. Such a declaration would be hearsay. As where the holder of a check went into a bank, and, when he came out, said he had demanded its payment; this declaration was held inadmissible to prove a demand, as being no part of the *res gestæ*. This statement was mere narrative, wholly detached from the act of demanding payment, which was the fact to be proved. But when the act of a party may be given in evidence, his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations, as a part of the transaction, and the tendency of the contemporary declarations, as a part of the transaction, to explain the particular fact, distinguish this class of declarations from mere hearsay.

Such a declaration derives credit and importance, as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.

The *res gestæ* are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases, which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are established by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, the *res gestæ* mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described.

The main transaction is not necessarily confined to a particular point of time, but may extend over a longer or shorter period, according to the nature and character of the transac-

tion. Thus, where a debtor leaves his house to avoid his creditors, which is an act of bankruptcy, and goes abroad, and continues abroad, the act of bankruptcy continues during the continuance abroad for this purpose.

So declarations, to be admissible, must be contemporaneous with the main fact or transaction ; but it is impracticable to fix, by any general rule, any exact instant of time, so as to preclude debate and conflict of opinion in regard to this particular point.

Perhaps the most common and largest class of cases in which declarations are admissible, is that in which the state of mind or motive with which any particular act is done is the subject of inquiry. Thus, where the question is as to the motives of a debtor in leaving his house and going and remaining abroad, so as to determine whether or not an act of bankruptcy has been committed, his declarations when leaving his house and while remaining abroad, as to his motives for leaving his house and for remaining abroad, are admissible in evidence. Such declarations, accompanying the act, clearly belong to the *res gestæ*. They are calculated to elucidate and explain the act, and they derive a degree of credit from the act.

It was on this principle that, on the trial of Lord George Gordon, the cries of the mob were received in evidence. The prisoner was tried for treason, committed, as it was charged, by levying war against the king ; which consisted, in fact, as alleged, in attempting to effect by force a repeal of an act of parliament, which had been passed in favor of catholics. The prisoner presented a petition to parliament for a repeal of the obnoxious act, and, in doing this, was accompanied by many thousand persons whom he had collected and organized for the purpose, who took possession of the lobby and avenues to the house of commons in a menacing manner, and insulted and ill-treated some members of each house of parliament, and refused to retire after the petition had been presented ; but insisted on a repeal of the offensive act, and kept up the cry of " A repeal ! a repeal ! no popery ! " These cries manifestly formed a part of the *res gestæ*, and tended to explain

the purpose and intention of the multitude which the prisoner had called together and took with him in presenting the petition, and were, therefore, admissible in evidence.

The text books and the adjudged cases entirely agree, in regard to the general rules and principles which govern the admission of declarations as belonging to the *res gestæ*. These rules are not arbitrary, but are founded on sound reason and just discrimination. They are not shifting and uncertain, depending on the exercise of any unrestrained discretion; but are certain and settled, and should be strictly observed, as applicable to that great and important branch of the law, the admissibility of evidence.

But, though the adjudged cases do not conflict in regard to the general principles, it would not be easy to reconcile some of the decisions with the avowed and acknowledged principles. Declarations standing by themselves are hearsay; there must be some main fact or act, which is itself admissible in evidence; and declarations are admissible only in consideration of their bearing to such main fact or act certain relations, which have been before particularly described. Declarations bearing such relations to the main fact or act belong to the *res gestæ*.

Every case has its own peculiar distinctive *res gestæ*; and to determine, in any particular case, whether or not there is properly any main fact, and what declarations, facts, and circumstances belong to it, as forming the *res gestæ*, is often very difficult, requiring very careful consideration and nice discrimination.

The case of *Wright v. Tatham*, 5 Clark & Finnelly, 670, forcibly illustrates this difficulty, and presents a very singular instance of disagreement among eminent judges. The point in issue was the sanity of John Marsden, and the particular question was, as to the admissibility in evidence of certain letters, which had been addressed to him by different persons, and which were found, after his decease, opened with other papers, in a cupboard under his book-case, in his private room. The great and difficult question was, whether there was any act, admissible in evidence, which these letters

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would qualify, illustrate, or explain, so that they were, on that ground, receivable.

The case was first tried before baron Gurney, and the letters were rejected. A bill of exceptions was tendered, and the case was argued in the exchequer chamber. Of seven judges who sat in that court, four thought the letters receivable and three were of a contrary opinion; but the point was not decided, a new trial being granted on another ground. The cause was tried again before the same learned baron, and, on this trial, the letters were admitted in evidence. A motion was, on this ground, made for a new trial; and lord Denman, after time taken to consider, delivered the judgment of the court, declaring the letters to be inadmissible, and therefore making the rule for a new trial absolute.

The cause was then tried before Mr. Justice Coleridge. The letters were offered and rejected. A bill of exceptions was tendered; judgment was signed, as of course, for the plaintiff, in the court of king's bench; and a writ of error was then brought in the exchequer chamber. The judges of this court were equally divided in opinion, and the judgment of the court below was therefore affirmed. Upon this affirmation, a writ of error in the house of lords was brought. A question was put to the judges, whether these letters, three in all, were admissible in evidence on behalf of the plaintiff in error, who was the original defendant. Three of the judges were of opinion that all the letters were admissible; three considered that only one was admissible; and six thought that neither was admissible. So six were for reversing the judgment, and six for affirming it. The house of lords affirmed the judgment of the court below.

The authorities upon the subject of admitting evidence as belonging to the *res gestæ* are numerous, but it will be sufficient to refer to some of them. 1 Greenl. Ev. § 108; 1 Starkie Ev. § 28; 1 Phillips, p. 231 (4th Amer. from 7th London ed.); Cowen & Hill's note, Part L, pp. 585, 586; *Noyes v. Ward*, 19 Conn. 250; *Rawson v. Haigh*, 2 Bing. 99; *Ridley v. Gyde*, 9 Bing. 349; *Hadley v. Carter*, 8 N. H. 40; *Carter & Wife v. Buchannon*, 3 Kelly, 513; *Plumer v. French*, 2 Foster, 450; *Scaggs v. Mississippi*, 8 Sm. & Mars. 722; *Enos v.*

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Tuttle, 3 Conn. 247; *Poole v. Bridges*, 4 Pick. 378; *Allen v. Duncan*, 11 Pick. 308; *Commonwealth v. McPike*, 3 Cush. 181; *Haynes v. Rutter*, 24 Pick. 242; 21 Howell's St. Tr. 542; *Gray v. Goodrich*, 7 Johns. 95.

It remains to apply the settled principles of the law to the particular case now under consideration. The declarations of the doctor, who was called to Mrs. Lund after the accident, and made an examination, were offered, to show the extent and nature of the injury she had received. There was no question in regard to the examination; that act, of itself, detached from the declarations, was wholly unimportant and immaterial. There was, therefore, in legal contemplation, no main act with which the declarations could be connected. The declarations, though made at the time, were, in no proper sense, a part of the examination. They merely announced the results, the opinion of the doctor, the conclusion at which he arrived. These declarations might have been made with precisely the same effect, at any subsequent time, a day or a week after the examination.

The declarations were mere abstract statements, wholly detached from any main act or fact admissible in evidence, and depending for their effect entirely on the credit of the doctor. They were the expression of a professional opinion, and had their weight wholly as such. Such declarations are mere hearsay, and were clearly improperly admitted in evidence; and, for that reason, a new trial must be granted.

Verdict set aside, and new trial granted.

DANIEL N. BARNEY vs. JOHN J. NEWCOMB.

A bank which discounts a bill of exchange payable to the order of "A. B. Cashier," may maintain an action on such bill in its own name.

The purchaser for a valuable consideration of bills of exchange, drawn in pursuance of a written authority and a promise to accept by the drawee, purchasing on the faith of such authority and promise, may maintain an action in his own name against the drawee, upon the breach of such promise to accept.

One who is authorized to draw drafts on another, "at ten or twelve days," with nothing to indicate whether ten or twelve days *after date* or *after sight* is meant, may exercise his own discretion and consult his own convenience in that particular.

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A written instrument, the true import of which is doubtful, and the intention of the parties to which cannot be determined from its language, will be construed most strongly against the person using the doubtful language, and in favor of him who has been misled and advanced his money upon it.

The rights of the parties to a bill of exchange, drawn by A. of New York on R. of Massachusetts, and afterwards purchased by C. of New York, who brings an action against B. for non-acceptance, are to be determined by the laws of Massachusetts.

In an action by the purchaser of a bill of exchange in New York, against the drawee in Massachusetts, for non-acceptance, the drawer, who also resides in New York, is a competent witness for the plaintiff; his liability in damages to the plaintiff, under the laws of New York, in the event of the failure of the plaintiff to maintain the action, being too remote and contingent an interest to exclude him.

THIS was an action on the case, brought by the plaintiff, an inhabitant of the city of Buffalo, in the state of New York, to recover for the non-acceptance and non-payment of three drafts drawn upon the defendant, an inhabitant of Boston, by Hawkins, Austin, & Co., a firm doing business in Buffalo. It was tried in this court before *Fletcher, J.*

The plaintiff's writ contained the money counts, and a specification of claim that while doing business under the name and as the bank of Lake Erie, on the dates hereinafter mentioned, he advanced the sums hereinafter stated, on drafts or bills of exchange drawn by Hawkins, Austin, & Co., at the defendant's request, on hogs forwarded to the defendant at his request, by Hawkins, Austin, & Co., and the defendant's promise to Hawkins, Austin, & Co., to pay the drafts or bills so drawn, upon the faith of which, the bills or drafts on which this action is brought, were so drawn and discounted; and which drafts or bills were made payable to T. M. Janes, cashier, the agent of the plaintiff in that behalf, and have never been paid.

1848.	December	19.	On draft payable 10 days after date	.	.	.	\$753.00
"	"	20.	" " " 12 " " "	.	.	.	265.00
"	"	23.	" " " " " " "	.	.	.	700.00

\$1,718.00

The defendant pleaded that he did not assume and promise in manner and form as alleged, and filed a specification denying that he promised to pay or accept any such drafts to any body; that if he made any promise to pay the drafts to any

body, it was to Hawkins, Austin, & Co., and not to the plaintiff, and that the plaintiff has no right to sue on any such promise; and that, if he authorized Hawkins, Austin, & Co., to draw any such drafts, it was on certain terms and conditions which were not complied with.

The plaintiff offered, in support of his claim, the deposition of Homer B. Hawkins, one of the firm of Hawkins, Austin, & Co. The defendant objected to the testimony of Hawkins, on the ground that he was incompetent by reason of interest, and offered the laws of New York, where Hawkins, Austin, & Co., and the plaintiff reside, and where the draft was drawn, that the drawer is liable to pay damages. The presiding judge, for the purposes of the trial, ruled that the witness was competent.

It appeared that the plaintiff was and always had been the sole owner and proprietor of the bank of Lake Erie, an individual bank, doing business under the general banking law of New York; that the firm of Hawkins, Austin, & Co. were merchants in the city of Buffalo, engaged in the produce and commission business; that the defendant was a commission merchant in the city of Boston; that, from the fall of 1847 to December, 1848, (the time when the drafts for the non acceptance and non-payment of which this suit was brought were drawn,) Hawkins, Austin, & Co. forwarded corn, pork, and butter, to the defendant, to be sold by him, and drew drafts against the same; that this business had amounted to the sum of twenty thousand dollars during this time; that the plaintiff had discounted other drafts on the defendant, drawn as above stated, to the amount of six thousand dollars, which had been accepted and paid.

Numerous letters of Hawkins, Austin, & Co. and the defendant, were introduced in evidence, of which the following are the most material:—

Under date of December 1, the defendant writes: "I am in hopes you will get prices down to three and a half or three and three quarter cents, as it is well to start low. It has been rather dull market with us the past four or five days, weather warm, and good hogs selling at five and a quarter and five

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and a half cents; but, the first snap of cold weather, buyers will bite sharper, and pay up to six cents, which will be about the ruling rates this winter. It will be well to have them coming along in lots of twenty, thirty, or forty, and you may draw at ten or twelve days. I would not advise you to pay over four cents, and as much less as possible, and please draw as light as possible along at first."

Hawkins, Austin, & Co. wrote to the defendant, on the 19th of December, 1848, as follows: "Will you please say in your next how we can draw, or how much you will accept for, that we can show the bank. Patchins to day said, if we would telegraph and get your authority to draw, he would give us the money; he said, if the weather was warm you would not accept. Mr. Barney, president of the bank of Lake Erie, gave us the money, though very short of currency." And Hawkins testified that in the first part of the last letter he referred to Patchins's bank, and the bank of Attica.

In a letter of December 28, Hawkins, Austin, & Co. write to the defendant: "In ours of the 19th, we asked you to say how much you would accept for, that we can show the bank, as we cannot get money without your written authority to draw."

It also appeared that the drafts for the non-acceptance of which this suit was brought, were drawn on the day they bear date, by the firm of Hawkins, Austin, & Co., in pursuance of the supposed authority they had from the defendant, in his letters to them; that Hawkins, Austin, & Co., upon the faith that, by these letters, they were authorized to draw drafts upon the defendant, forwarded to him, before drawing, certain hogs; that each of the drafts was drawn upon a separate parcel of hogs, forwarded on the dates mentioned in the receipts annexed to the drafts; that Hawkins, Austin, & Co. procured the drafts to be discounted by the plaintiff on the day of their respective dates; and that, for the purpose of procuring such discount, they exhibited several of the defendant's letters to the plaintiff, and the receipts attached to the drafts were respectively presented and delivered to the plaintiff, at the time of procuring the discounts, and annexed to the drafts;

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and that the discounts were made upon the faith of the supposed authority in the letters, and after the plaintiff had received the receipts; that the drafts were made payable to T. M. Janes, as he was the cashier of the plaintiff's bank of Lake Erie; that they were discounted at the legal rate of interest of one fourth of one per cent for collecting the same, on two of the drafts, that being the difference of exchange between Buffalo and Boston,—on the other draft no charge was made for difference of exchange; that the drafts had always been and are still the property of the plaintiff's bank; that the letter of December 1, before referred to, was exhibited to the plaintiff in the presence of Janes, and had been referred to, to the knowledge of Janes, when Hawkins, Austin, & Co. applied to have drafts drawn on the defendant for a longer time than twelve days discounted, which request was refused, on the ground that the letter did not authorize drafts on a longer time; that the drafts had been regularly protested for non-acceptance and non-payment.

After the opening for the defence, the case was withdrawn from the jury, and reserved for the full court. If, in the opinion of the court, the plaintiff cannot maintain this action, a nonsuit is to be entered; otherwise, such disposition is to be made of the case as the decision of the court upon the several points therein shall require.

C. G. Loring, for the plaintiff.

G. M. Browne, for the defendant.

1. The legal title to the drafts is in Janes, and parol evidence is not admissible to prove the contrary. *Stackpole v. Arnold*, 11 Mass. 27; *Hunt v. Adams*, 7 Mass. 518; *West Boylston Manufacturing Co. v. Searle*, 15 Pick. 225.

2. The defendant's promise to Hawkins, Austin, & Co. was not negotiable. Brooke's Notary, 84; *Bank of Ireland v. Archer*, 11 M. & W. 383; Story on Bills, § 249; Chitty on Bills, (8th ed.) 308; *Birckhead v. Brown*, 5 Hill, 634. *Russell v. Wiggin*, 2 Story's R. 213, was a letter of credit addressed to *all persons*, and designed to be exhibited for the purpose of inducing persons to advance money. In *Carnegie v. Morrison*, 2 Met. 381, the letter of credit was addressed to *the*

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plaintiff by name. In the case at bar, the letters were never intended to be shown to third persons. They contain internal evidence that they were merely familiar, confidential letters between business men.

New York law, which governs the case, is clearly for the defendant. 5 Hill, 646.

Further, the rule in America, as to bills, applies only to bills payable on demand, or a fixed time after date. Story on Bills, § 249; *Wildes v. Savage*, 1 Story's R. 22.

3. The authority to Hawkins, Austin, & Co. was, in legal effect, to draw at ten or twelve days *after sight*, not *after date*. *Greele v. Parker*, 5 Wend. 414, 418; *Ulster County Bank v. McFarlan*, 3 Denio, 553.

4. The defendant's promise was conditional; to wit, that Hawkins, Austin, & Co. should first put him in funds to the amount of \$1,000, at least.

5. Hawkins was inadmissible as a witness, on the ground of interest.

FLETCHER, J. The plaintiff, an inhabitant of Buffalo, New York, seeks in this action to recover of the defendant, a commission merchant of Boston, the payment of three drafts, drawn on the defendant by Hawkins, Austin, & Co., a mercantile firm doing business in Buffalo.

It appeared in the case, that, from the fall of the year 1847 to December, 1848, there had been extensive dealings between the firm of Hawkins, Austin, & Co. and the defendant; that Hawkins, Austin, & Co. had sent a large amount of property to the defendant, to be sold by him, and drawn drafts against such property, and that the plaintiff had discounted drafts thus drawn on the defendant, for the amount of \$6,000, which had been accepted and paid.

On December 1, 1848, the defendant wrote to Hawkins, Austin, & Co., in regard to the business between them, and particularly as to the market for pork; and especially in regard to their buying and sending for sale dressed hogs. In relation to sending the hogs, the defendant, in this letter to Hawkins, Austin, & Co., says: "*It will be well to have them coming along in lots of twenty, thirty, or forty, and you may draw at ten or twelve days.*"

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This authority is not exposed to the objection made by the defendant, that, if considered as an authority at all, it would be unlimited and unqualified; it was limited to drawing against actual consignments of hogs. Nor was the authority on condition that the pork was bought at four cents. The defendant said he would not advise Hawkins, Austin, & Co. to pay over four cents.

In pursuance of the express authority given in this letter, Hawkins, Austin, & Co., on the 19th, 20th, and 23d of December, drew the three drafts in question in this suit. This letter was exhibited to the plaintiff, to show the authority of Hawkins, Austin, & Co. to draw: and, in reliance upon that authority, and the consequent engagement of the defendant to accept the bills, the plaintiff discounted the bills for Hawkins, Austin, & Co.

Each draft was drawn against a consignment of hogs to the defendant, according to the defendant's direction; and to each draft was attached a receipt on paper, showing that the hogs had actually been thus forwarded.

The defendant, in fact, received all the hogs thus forwarded and against which the drafts were drawn, and sold them and received the proceeds, but refused to accept the drafts. For this refusal of the defendant to accept the drafts, the plaintiff instituted, and now claims to maintain, this action.

It is clear that the defendant gave Hawkins, Austin, & Co. authority to draw on him, against the hogs which they might send to him. Hawkins, Austin, & Co. sent the hogs, and drew the drafts in question against them. The defendant's letter, giving authority to draw on him, was shown to the plaintiff, and upon the strength of it the plaintiff discounted the drafts in question.

The question now is, whether the plaintiff can maintain this action against the defendant, for not accepting the drafts; giving authority to draw necessarily importing an engagement to accept.

1. The first ground taken by the defendant against the plaintiff's right to recover is, that the legal title to the drafts

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was in Janes, and parol evidence is not admissible to prove the contrary. The plaintiff did business under the name of the bank of Lake Erie, under the banking law of New York. Janes was the cashier of the bank. The bills were drawn payable to the order of Janes as cashier. Janes was merely the plaintiff's agent; his agency appears on the face of the drafts; the money paid for the drafts was the plaintiff's money, and the drafts belong to the plaintiff.

There can be no doubt whatever that it is competent for the plaintiff to show these facts, and to claim payment of the drafts as his own, and in his own name.

2. The defendant's next objection is, that his promise to Hawkins, Austin, & Co. was not negotiable. This objection, to have any application to this case, must be understood to mean, that there is no privity of contract between the plaintiff and defendant, to enable the plaintiff to maintain this action. But that question is not now open to discussion in this commonwealth. It has been fully considered, discussed, and settled by the decisions of this court and the courts of the United States.

In *Russell v. Wiggin*, 2 Story, 213, the subject was most ably and elaborately discussed by Mr. Justice Story, and the English and American cases thoroughly examined and considered. In that case, a person who took bills drawn in pursuance of a letter of credit, given by the drawee to the drawer, maintained a suit on them in his own name against the drawee, for not accepting the bill.

In that case, there was a formal letter of credit. But the same principle upon which the plaintiff recovered in that case has been adopted in a case precisely like the present.

In *Carnegie v. Morrison*, 2 Met. 381, this same subject was very fully discussed and the authorities examined, by the chief justice of this court, in giving the opinion; and it was adjudged, in that case, that the holder of a bill might maintain an action in his own name against the drawee, who had given a letter of credit to another, authorizing the draft. This was also a case of a formal letter of credit.

But a very recent case in this court, *Murdock v. Mills*,

11 Met. 6, is precisely like the present case. In that case, there was only a letter addressed to a person, authorizing him to draw on the defendant. The party did draw, the plaintiff bought the bill, and brought a suit in his own name against the defendant, who gave the authority; precisely as in this case.

In deciding the case of *Murdock v. Mills*, the court say: "It is now a well settled principle of American mercantile law, respecting bills of exchange, that when a party holds the written authority of another to draw bills on him, with a promise to accept them when so drawn, a third person, purchasing such bill for a valuable consideration, upon the faith of such written authority, can maintain an action against the writer in his own name, upon the breach of such promise to accept." This decision directly meets and completely settles this point in the present case, and leaves nothing open for discussion.

Though different views have been taken of the subject in England and New York, yet it is believed that the doctrine established by the decision above referred to is in perfect accordance with the general understanding of the mercantile community, and is essential to the transaction of mercantile business. In truth, it is difficult to see how business could be transacted by means of bills of exchange, if purchasers of bills would have no claim on drawees who had authorized them to be drawn.

It was said, in the argument for the defendant, that his letter to Hawkins, Austin, & Co. was confidential. But there is no evidence that it was confidential. It was a business letter, and Hawkins, Austin, and Co. were well authorized to make the use which they did make of it, to enable them to raise money on their drafts. Without such use, the authority given them to draw would have been of no value to them.

It abundantly appears, in the frequent applications of Hawkins, Austin, & Co. for another letter, with authority to draw to raise money at Patchins's bank, that both parties well understood that an authority to draw would of course be used to raise money on the drafts.

Some authorities were referred to by the defendant's counsel, in regard to a promise to accept being treated as an acceptance. But that point is immaterial in the present case, as this suit is not on an acceptance but on a refusal to accept.

Another point taken by the defendant's counsel was, that the authority to Hawkins, Austin, & Co. to draw at ten or twelve days was, in legal effect, an authority only to draw at ten or twelve days after sight, and not after date, as they were in fact drawn.

This position is supported by the case of *The Ulster County Bank v. McFarlan*, 5 Hill, 432, and affirmed by the court of errors, 3 Denio, 553.

This decision is supported by no adjudged case. But in the case of *Parker v. Greele*, 2 Wend. 545, a recovery was had on bills which were drawn at four months after date, under an authority to draw at "three and four months," without specifying whether after date or sight. That case was severely contested; but this point was not raised, though the facts in that case presented the point as fully as it is presented in this case, or in the case of *The Ulster County Bank v. McFarlan*.

The decision of the supreme court, in *The Ulster County Bank v. McFarlan*, rested upon no authority, and was affirmed in the court of errors by twelve against nine.

The opinion of the supreme court was placed upon the ground that the drawee, by authorizing a draft at ninety days, intended to secure himself a credit of ninety days, after notice that the bill was drawn; but, if drawn ninety days after date, he might not have any time, as the holder might not present the bill till it came to maturity. The answer to that is, if he meant so he should have said so; and, as he did not say so, there is nothing to show that he meant so, as it is as usual to draw after date as after sight.

In the present case, the defendant authorized Hawkins, Austin, & Co. to draw at ten or twelve days; he does not say after date or after sight. There is surely no rule of law, which says it shall be after sight. As the defendant did not

prescribe how the drafts should be in this particular, and as there is no rule of law which prescribes how they shall be in such case, and as it is common and usual to draw both ways, after date and after sight, it was clearly and necessarily left to the drawer to exercise his own discretion and consult his own convenience in this particular.

The drawee might very well leave it to the drawer to consult his own discretion and convenience, in drawing after date or sight, relying upon the well known general, if not universal, custom of merchants, for the drawer to advise the drawee that he has drawn upon him.

The drawer must also have well understood, that it would be most inconvenient for the drawee, in getting the drafts discounted, to draw them payable after date. The fact, that the drawer himself took no exception to the drafts, on this account, is entitled to consideration, as showing his understanding of the authority given in this particular.

Where the true import and meaning of a written instrument is doubtful, and the intention of the parties cannot be determined from its language, the right doctrine is, that it shall be construed most strongly against the person using the doubtful language, and in favor of him who has been misled and advanced his money upon it. *Mason v. Pritchard*, 12 East, 227; *Lawrence v. McCalmont*, 2 How. 426, 450; *Hargreave v. Smea*, 6 Bing. 244; Story on Contracts, §§ 258, 260, 261; *Walrath v. Thompson*, 4 Hill, 200.

The plaintiff paid his money in good faith for those drafts, upon the authority given in the defendant's letter; and there is no principle of law or equity upon which the defendant can defeat the plaintiff's claim, because the drafts are drawn after date and not after sight; the defendant himself not having required or intimated, in any way, a wish to have them drawn in one way rather than another.

Besides, as these drafts were drawn expressly on property sent to the defendant, which he received and sold, and took the proceeds, it is difficult to see how, in such case, he can rightfully refuse, on any ground, to accept and pay the drafts.

Mr. Chitty says: "It should seem that, when funds have

been remitted to a drawee, for the express purpose of providing for a bill drawn upon him, and he receives and retains the same without objection, or returning the amount, an engagement to accept may be implied." Chitty on Bills, p. 281.

It was said further for the defendant, that the defendant's promise to accept was conditional; to wit, that Hawkins, Austin, & Co. should first put him in funds, to the amount of at least \$1,000. But there is no evidence to maintain this position in point of fact.

It was maintained, further, that the rights of the parties were to be determined according to the law of New York. But the letter of credit being drawn here, and the contract to accept and pay to be performed here, there can be no doubt that the case must be determined according to the laws of this commonwealth.

It was maintained, further, that Hawkins was not competent as a witness, on the ground of interest; that if the plaintiff did not prevail, he might have a suit against Hawkins, Austin, & Co., and recover damages on the drafts, according to the law of New York. But a merely possible result of that sort would create, at most, but too remote and contingent an interest to exclude the witness.

The conclusion is, that the plaintiff's action is well maintained, and that he must have judgment.

Judgment for the plaintiff.

ROBERT B. BASSETT vs. GREENLEAF C. SANBORN & another.

A. agreed under seal to build a house for B., but the work not being completed at the stipulated time, B. directed A. to discontinue, and the contract was not completed. It was held, nevertheless, that A. might recover upon the common counts for work and labor, &c., deducting all damages to B. from the failure of A. to comply with the contract.

The fact that payment was to have been in part by real estate, will not prevent A. from recovering on the common counts, especially as the true value of the land was not over estimated in the original contract, and B. had refused to convey it in part payment for the work actually performed.

By the original contract, A. was to be paid in thirty days after the completion of the work; held, that he might recover interest in this action after thirty days from the time he might have completed it, but for the interference of B.

A conditional acceptance by a debtor of an order on him by a creditor, in favor of a third party, does not operate as a payment, especially if it be afterwards given up to the debtor by such third party unpaid.

THIS was an action of debt, to recover on the common counts, for materials furnished and for work and labor done by the plaintiff, in the erection of a frame dwelling house on land belonging to the defendants in Roxbury. The writ contained also a special count in debt.

The case was referred to an auditor by a rule of court, "his decision on the facts to be final." The following statement is condensed from the auditor's report.

After the opening, by the plaintiff, certain objections to his right of recovery were filed by the defendants, of which the following were the most material.

"An objection to any evidence under the special count in debt, because the plaintiff seeks thereby to recover unliquidated damages under a contract under seal; also to any evidence under the common counts for work and labor, and materials done and furnished, under special contracts which remain open, unrescinded, and unperformed."

An agreement under seal was executed in duplicate by the parties, bearing date November 20, 1845. By this agreement, the plaintiff promised and agreed with the defendants, to furnish all the materials and do all the work, "except digging and stoning the cellar and building up the brick chimneys."

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necessary for the thorough and complete erection, on land of the defendants in Roxbury, of a frame dwelling-house, which was to be built according to plans and specifications referred to in the agreement. The agreement provided that the defendants "shall dig and stone the cellar, and build up the brick chimneys, and find all the materials for the same." The plaintiff was to have, for the work and materials, \$3,200, to be paid by instalments as the work advanced.

The plaintiff was to have until the 1st of May, 1846, and no longer, to complete the house according to the terms of the contract; but the contract did not specify when the defendants should have the cellar dug and stoned, although the plaintiff could not commence the erection of the house until that was done. The plaintiff prepared his frame and other stock, and carried them from Boston to Roxbury by the middle of March; but the digging and stoning of the cellar were not completed by the defendants until some time between the 15th and 20th of April.

It was wholly impossible for the plaintiff to complete the house between the time when the foundation was ready and the 1st day of May, the time fixed by the contract for its completion. Accordingly, on the 30th of April, 1846, an agreement between the parties under seal was indorsed on the original contract, extending the time for the completion of the contract until the 20th day of June then next. At the same time, an additional contract was entered into between the parties for the erection, by the plaintiff, of an observatory on the house, for which the defendants agreed to pay him the further sum of one hundred and fifty dollars, of which one hundred and thirty were paid him when the contract was made.

From the time when the plaintiff commenced the erection of the house, he prosecuted the work with ordinary and reasonable diligence until the 20th of the ensuing June, having, during the whole time, a gang averaging eight hands at work on the premises, and being himself there about two hours daily, seeing to the progress of the work. It would have been possible for the plaintiff to complete the house on the

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20th of June, by putting on an extra number of hands ; but there were as many men employed as could work to advantage, and as many as are usually employed in the erection of such a house.

On the 20th of June, the plaintiff was prosecuting his work on the house, having eight men employed thereon, when one of the defendants went on the premises and took possession of the house, directing the plaintiff's men to quit, saying the time was up and he was going to have the work stopped ; and, on the same day, the defendants left a written notice at the plaintiff's house in Boston, the contents of which were proved to be in substance, that the plaintiff's contract had expired, and that the defendants did not want or would not have any more of his work on the house. The plaintiff's men left the premises, as directed by the defendants, and no work was subsequently done by the plaintiff on the house, nor was there any evidence that he subsequently offered to complete his contract.

No evidence was offered by the defendants to show that any notice of any kind, other than that of June 20, either before or after that date, was given by them to the plaintiff. The defendants took the house as it was on the 20th of June, and finished it at their own expense. The work left unfinished might, in the exercise of reasonable and ordinary diligence, have been completed within three weeks.

The size and general plan of the house conformed to the specifications referred to in the contract, but in some details there were variations from the specifications. There was no evidence, other than the fact of the variations themselves, tending to show that these departures from the specifications were the result of any intent on the part of the plaintiff, wilfully to wrong the defendants, and skilful mechanics, who were produced as witnesses, differed in the opinions expressed by them as to the effect of these variations upon the permanent strength and durability of the structure and its substantial value. It appeared in evidence that one of the defendants, who were themselves builders, visited the premises oftener than once a week, while the plaintiff was going on

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with the work, and, when there, was in, upon, and around the house. The only instances in which it was shown that any dissatisfaction was expressed by the defendants, while the work was in progress, were that, while the plaintiff's men were at work getting out the frame in Boston, one of the defendants complained to the plaintiff's foreman, that the floor joists were too far apart, and that they should have been tenoned instead of being gained; that the foreman mentioned it to the plaintiff, who said he was sorry that they were not placed nearer to centres, and, after the house was raised, the same defendant complained to the same foreman that the studs were too far apart.

The auditor's report on the above facts was "that up to June 20, the plaintiff was going on with his work, with an honest intention to go by the contract, and that, so far as he had then proceeded, there had been a substantial execution of it, although there were deviations as to some particulars not the consequence of fraud or gross negligence, and which were of such a character that skilful and experienced mechanics differ as to their effect upon the permanent strength and substantial value of the structure; that the materials furnished and the work done are valuable and beneficial to the defendants, and that the plaintiff is entitled to recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials furnished; and, in determining the amount which he is so entitled to recover, I have charged the defendants with the prices according to the two contracts, and have credited them with the payment made by them to the plaintiff, and with a further sum sufficient to cover their reasonable expenses incurred after June 20, in the completion of the house according to the contract, and to indemnify them for the defects in materials furnished, and for any diminution in the permanent value of the house, by reason of deviations by the plaintiff from the terms of the contract.

By the original contract, the balance due to the plaintiff was to be settled at the expiration of thirty days from the time when the building shall be completed, and I have found that the defendants might have completed the building by the 11th

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day of July, I have considered that the plaintiff is entitled to interest on the balance due him, from the expiration of thirty days after July 11, to the date of the plaintiff's writ, and I have charged the defendants in said account with interest accordingly.

The result of the account so stated shows the amount due from the defendants to the plaintiff, at the date of his writ, to have been thirteen hundred and fifty-three dollars and twenty-six cents. (\$1,353.26.)

The defendants claimed to have allowed them the amount of a certain order drawn on them by Bassett, desiring them to 'pay G. N. Black & Co., or order, nine hundred dollars, when the house I am now building for you under contract, dated November 20, 1845, is finished according to said contract.'

The said order was accepted by the defendants, who agreed 'to pay the same when the said Bassett has finished the house according to the terms of the contract.'

And a receipt was indorsed on the original contract of nine hundred dollars, by accepting an order in favor of G. N. Black & Co. No payment has ever been made on said acceptance, and G. N. Black & Co., at the hearing before me, tendered the said acceptance to the defendants; but the defendants did not accept said tender, and said acceptance was surrendered to me to be placed on the files of the court for the defendants' use, and the same has been delivered by me to the clerk of the court, and has been filed by him with the papers in the case. I disallowed the amount of their acceptance as a credit to the defendants."

M. S. Clarke, for the plaintiff.

E. Blake, for the defendants.

DEWEY, J. The plaintiff seeks to recover, under a declaration containing the common counts for work and labor done and materials furnished, damages for his services and expenditures in the construction of a dwelling-house on land belonging to the defendants, and which services were performed under a special contract under seal.

The case presented is not one where the stipulations of the plaintiff have been fully performed, and where the party

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might put his case upon the doctrine, that, however special the contract, yet if the terms on his part have been fully performed, and nothing remains to be done but the payment of a stipulated sum of money, such payment may be enforced under the general counts.

The plaintiff contends, that the present case falls within the principle of the cases wherein it has been held, that, for labors and services and materials furnished under a special contract, and where the party has not fully performed his contract in every particular, yet he may recover, so far as the defendant has received and is enjoying the fruits of his labors, allowing the defendant, as a set-off, all sums necessary to his complete indemnity for all deficiencies in the work, or failure literally to comply with the terms of the contract.

On the part of the defendants, it is insisted, that this case does not fall within the principle settled in the cases of *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Congregational Meeting-house in Lowell*, 8 Pick. 178; *Brewer v. Tyringham*, 12 Pick. 547; *Snow v. Ware*, 13 Met. 42, and cases of like character. It is said, that in these cases the deficiencies, or neglect to fulfil the special contract, were only slight deviations in the manner of performance, or the time of doing the same, but that there was really a substantial performance of the entire contract. This may be so, and to this extent, as entire precedents, these cases may differ from the present. But we are to look at the principle. The foundation upon which these cases rest was the necessity of introducing a modification of the doctrine, that a party stipulating to do certain work under a special contract could recover nothing therefor, if the party doing the same had not literally complied with all the minute stipulations of the special contract, although the work and materials were of greater value and benefit to the other party, and were, from the very nature of the case, to accrue solely to his benefit. But these cases were all cases of a deviation from the special contract, and such a departure from it, that the party could not have maintained an action thereon, as he could not have shown a performance on his part, which was required by the terms of the contract.

The present case presents these facts: the parties had entered into a special contract, under which the plaintiff has rendered the defendants valuable services, and, while engaged in good faith, and with the honest purpose of fulfilling his stipulations and completing the work, the defendants arrested his further progress, and prevented the full substantial performance of the contract; such interference and prevention on the part of the defendants occurring, however, after the expiration of the time stipulated in the special contract as the period for the completion of the work; and the question is, whether this latter fact takes the case out of the rule allowing a recovery on the common counts, to such extent as the defendant is really benefited by the services rendered, after making all proper deductions, although the work was not done strictly according to the terms of the contract.

That the fact, that the party had not completed the work within the time stipulated, would not necessarily bar a recovery upon the common counts for the actual benefits received therefrom by the defendant, if the work had been afterwards fully completed, will be conceded. But it is insisted, that, if there has been such failure in point of time, and the other party thereupon forbids further prosecution of the work, and, by reason of this, it is left unfinished, and the contract not substantially performed, the plaintiff cannot resort to his action on the common counts for what he has done, however honestly he may have intended to perform his whole contract.

If the position taken by the defendants is sustained, then it must follow, that, if there be any failure, however slight, to perform all the stipulations of the contract, and although such omissions or deficiencies are by no means incompatible with the substantial performance of the contract, yet the party performing the work may always be barred from recovery in any form, by the intervention of the other party before the substantial completion of the work, and his forbidding and preventing the finishing the work stipulated to be constructed. In the case supposed, it is quite obvious that the party who had performed the services and furnished the materials could

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not resort to an action on the special contract, because of his inability to aver performance on his part in every particular. If he can also be successfully met in an action on the general counts, by the defence that the work is not substantially finished, then he is entirely remediless, and wholly at the mercy of his employer, if such employer elects, at any time before the finishing the work substantially, to interfere and prevent its completion, upon the occurrence of any failure on the part of the builder to conform to the terms of the contract.

In the present case, much progress had been made in the work, and it was rapidly approaching to its completion, when the defendants interfered. But for that interference, so far as appears, no other material deviation from the contract would have occurred except the failure in point of time, which, as already remarked, would not have defeated the plaintiff's right of recovery on the common counts.

The cases of *Linningdale v. Livingston*, 10 Johns. 36, and *Raymond v. Bearnard*, 12 Johns. 274, cited by the plaintiff, tend strongly to maintain the position, that the conduct of the defendants, in interfering and preventing the completion of the work, when the plaintiff was, in good faith and with proper means, prosecuting the same to a speedy termination, was a rescinding of the contract. But, if it be doubtful whether these acts of the defendants amounted to a rescinding of the special contract on their part, we are of opinion that it was, at least, such an act as will estop the defendants from interposing the objection that the work is not substantially completed, and thereby prevent a recovery on the common counts, which the plaintiff would otherwise have been entitled to. The defendants might well have insisted, that the plaintiff should finish the building, before he was entitled to recover on the common counts, but they voluntarily waived that right, by forbidding the plaintiff to proceed to complete the same. It is no sufficient answer for the defendants, when called upon to make a proper compensation for these services and the materials found by the plaintiff, that the plaintiff had not finished the work within the precise time stipulated, and

they cannot avail themselves of this to justify a prevention of the substantial completion of the building, and subsequently, upon the plaintiff's yielding to this requirement of the defendants to proceed no further with the work, urge the fact that the work was not substantially completed, to prevent any recovery by the plaintiff on the common counts.

If it be said, that the defendants have the legal right to interpose and forbid the plaintiff from proceeding further in the work, after the expiration of the time in which he had stipulated to complete it, it may be conceded that they had such right, but, if exercised, it may have its effect upon the relation of the parties, and upon any right to object that the plaintiff has left the work unfinished. Had they not thus interposed, they might have made the objection; but, having done so, they have thereby estopped themselves from setting up the objection to a recovery on the common counts, that the building was not satisfactorily completed.

There are other peculiar circumstances in the present case, which strengthen the case of the plaintiff in an equitable view. The original time stipulated for the completion of the work was the 1st of April; but this was rendered impracticable, by reason of the failure, on the part of the defendants, to have the foundation for the same ready at the proper time. The parties, by mutual consent, then extended the time for finishing the work to the 20th of June. A suitable number of hands was employed by the plaintiff in the prosecution of the work, and the same was rapidly approaching to its completion, when the work was arrested by the peremptory order of the defendants. The case is free from all objections of voluntary or wilful abandonment of the work, or designed neglect to conform to the terms of the special contract.

The case, in the opinion of the court, is one where the plaintiff may maintain his action upon the general counts, giving the defendants the benefit, by way of set-off, or in diminution of damages, of the stipulations in the contract, and a remuneration for all omissions on the part of the plaintiff to comply with the same.

The particular provision in the special contract, that a part

of the payment for the services of the plaintiff was to be made by a conveyance to the plaintiff of a certain parcel of land, certainly presents some difficulty in the matter of maintaining this action upon the common counts. It would have been more objectionable, and perhaps fatal, to a recovery on the general counts, if the special contract had been fully performed by the plaintiff, and no act had taken place on the part of the defendants, interfering with the work.

This objection is, however, much weakened by the fact, that it is a case where the special contract was not performed, and its completion was prevented by the act of the defendants.

The application of the principle contended for by the defendants would obviously work great injustice, if so applied to all cases where part of the stipulated payment was to be made in something other than money. Take the case of a mere omission of completing the work in the time stipulated in the contract, and where there was no prohibition of continuing the work, and the same was, at some short period after, completed. Here, the special contract could not be enforced, because the same was not precisely performed on the part of the plaintiff, and his only remedy must be the resort to the common counts; and if the fact, that the original contract was to make the payment in part by a conveyance of land, deprives the party of recovery in this form, he would seem to be remediless.

It seems necessary, therefore, that, without reference to the stipulated mode of payment, where the special contract has not been performed, and the omission so to do, on the part of the plaintiff, has occurred under such circumstances as will justify a recovery at all, resort may be had to the common counts.

But, in estimating the sum to be paid by the defendants, if part payment was to be made in real estate, or any specific article of property, the sum to be allowed as damages should not exceed the actual value of the land, or other property stipulated to be secured in payment, which may be less than the sum at which it may have been estimated in the proposi-

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tion of the owner, when offering to convey the same as part of the payment for the work. The facts stated in the present case show, that the plaintiff offered to accept a deed of the land as part payment for the same, and in the manner stipulated in the contract, but the defendants refused to make such conveyance; had they done so, they would have secured to themselves the full benefit of a payment in land, agreeable to the terms of the contract. Under the circumstances, and it not appearing that the land was over-estimated, the fact that the payment was in part to be made by conveying certain real estate, should not preclude the plaintiff from recovering on the common counts.

We think, as the parties had fixed a certain time for payment, namely, thirty days from the time when the building should be completed, and the auditor has reported the time when the work might have been completed, but for the interference of the defendants, that, agreeable to his report, there may be allowed, as damages, interest after thirty days from that time, upon such sum as was due to the plaintiff.

The order drawn in favor of G. N. Black and Company, for the sum of nine hundred dollars, was properly disallowed as a part of the credit of the defendants. It was accepted only conditionally, and has not been paid by the defendants, nor does it appear that they are liable therefor, but, on the contrary, the same is surrendered and placed on the files of the court, for the defendants' use.

The result is, therefore, that judgment will now be entered for the plaintiff, agreeably to the report of the auditor.

Judgment for the plaintiff.

EDWARD G. LORING, Judge of Probate vs. HENRY ALLINE.

The 26th section of Rev. Sts. c. 79, which limits actions on guardian's bonds applies as well to a bond given on obtaining a license to sell real estate, as to the general guardianship bond; and by the term "discharged," in that section, is

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intended any mode by which the guardianship is effectually determined and brought to a close.

An action against the surety on a guardian's bond, which is commenced more than four years after the passing of the Rev. Sts., is barred by c. 79, § 26, although the bond was given and the guardianship discharged, before the statute went into operation. The statute relates to the remedy only, and is not retrospective.

THIS was an action of debt on a bond given by the defendant, as surety of John Delay, on Delay's obtaining a license to sell the real estate of certain minors, of whom he was guardian. The writ was dated October 15, 1849, and the case was tried in this court before *Metcalf*, J., by whom it was reported for the consideration of the whole court.

The bond was dated May 20, 1833; and it was agreed by the parties that Delay died in 1835, and proved, at the trial, that the minors named in the bond were under age at the time of his decease.

The defendant maintained that the action was barred by the statute of limitation, Rev. Sts. c. 79, § 26, but this objection was overruled.

It was thereupon agreed that, if the plaintiff could maintain his action, the defendant should be defaulted, and a hearing should be had in chancery to adjust the respective accounts of the actual parties to the suit; otherwise, the plaintiff should become nonsuit.

L. Gale, for the plaintiff, contended that there was no discharge of the guardian; and that Rev. Sts. c. 79, § 26, could not relate back to this bond, it having been executed before the statute was enacted.

P. Oliver, for the defendant.

The action cannot be maintained because it has not been brought within the time limited by law for such actions. Rev. Sts. c. 79, § 26; Rev. Sts. c. 2, § 6; Opinion of the Justices, 7 Mass. 523; *Ellis v. Paige*, 1 Pick. 43; Opinion of the Justices, 22 Pick. 571; Rev. Sts. c. 70, § 32, and c. 79, § 25; Worcester's Dictionary, word *any*. This provision of the Rev. Sts., though operating upon past causes of action, does not impair the obligation of the contract. *Brigham v. Bigelow*, 12 Met. 268; *Wright v. Oakley*, 5 Met. 400; St. 1835, c. 11 and c. 133.

The bonds referred to in Rev. Sts. c. 79, § 26, are all kinds of bonds given by guardians. St. 1783, c. 38, §§ 4 and 5; St. 1835, c. 11 and c. 133.

SHAW, C. J. The defence relied on, by a surety on a guardianship bond to the judge of probate, is, that it is barred by the statute of limitation. The provision in Rev. Sts. c. 79, § 26, is, "that no action shall be maintained against the sureties in any bond given by a guardian, unless it be commenced within four years from the time within which this chapter shall take effect, or within four years from the time when the guardian shall be discharged;" with a proviso not material. The court are of opinion, that by the term "discharged," in this statute, is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian, the arrival of a minor ward to the age of twenty-one, or otherwise. The statute, therefore, is a bar to this action, in which it appears that the guardian had died before the revised statutes were passed. Whether the statute would have been a bar, if the action had been brought after the expiration of four years from the death of the guardian, and within four years from the 1st May, 1836, when the Rev. Sts. went into operation, it is not necessary to give an opinion, because, in fact, the action was not commenced until 1849, thirteen years after the Rev. Sts. went into operation. And we are also of opinion, that this limitation applies as well to bonds given by guardians on obtaining a license to sell real estate, as the general guardianship bond. There is nothing in the terms to limit its operation to one species of bonds; the words are "any bond;" and there is nothing in the nature of a bond, given on a license to sell real estate, which may render it, in principle, an exception.

Nor do we think there is any force in the objection, that this bond had been given, and the guardianship discharged by the death of the guardian, before this statute went into operation. It is argued that to make this statute apply to such a bond would be to give it a retrospective operation. But this, we think, is a mistaken view. The statute is entirely pro-

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spective, and relates to the remedy only. The words are, "no action shall be maintained"—it is prospective in every sense—"unless commenced within four years from the time when this chapter shall take effect, or within four years from the time when the guardian shall be discharged." It is, therefore, not obnoxious to the charge that it is retrospective. Indeed, we think it the common practice, and open to no objection, in passing a statute of limitation, to make it apply as well to causes of action which have already accrued, as to those which may afterwards accrue, if sufficient time be allowed, between the passing of the act and the time fixed for the limitation, to afford a full and ample time to all persons, having such causes of action, to commence their suits.

Plaintiff nonsuit.



JERUSHA C. KING vs. DAVID PARKER & others.

A., being seized of an estate in fee, by his deed, dated December 26, 1777, conveyed to B. and others, and the survivor of them, as joint tenants, but without words of limitation to their heirs or to the heirs of the survivor, in trust to and for the use of a Lodge of Freemasons, to the only proper use, benefit, and behoof of the lodge forever. A., by his last will, gave all his real and personal estate to his children and grandchildren, and, at the death of one of the sons, his share of A.'s estate descended to the plaintiff. The plaintiff brought an action to recover her undivided part of the estate conveyed to the lodge; but it was held, that the conveyance was in trust, and the estate did not descend to the heirs of the grantor.

THIS was an action of ejectment submitted to the court on the following agreed statement of facts:—

On the twelfth day of January, 1764, the St. Andrew's Lodge of Freemasons, in the town of Boston, resolved, by a vote, to purchase a house for the benefit of the lodge; accordingly, Thomas Milliken, Samuel Barrett, Edward Foster, Caleb Hopkins, Moses Deshon, William Haskins, John Jenkins, Joseph Webb, were chosen a committee for that purpose.

On the thirty-first day of March, 1764, Catherine Kerr, by

her deed of that date, conveyed in fee the premises in question, known as the Green Dragon Tavern, unto the said Thomas Milliken, Samuel Barrett, Edward Foster, Caleb Hopkins, Moses Deshon, William Haskins, John Jenkins, and Joseph Webb.

The lodge was not at that time incorporated. Its income was by its constitution devoted to the relief of its poor members and their families, and, including the rents of this estate, had always been so applied.

On the 21st day of January, 1764, according to the date of the deed, (probably 1765,) William Haskins, by his deed of that date, released the estate to his associates.

On the 18th of February, 1768, the lodge "voted, that Moses Deshon, (and others,) convey the house, land, and premises which they, together with Mr. William Haskins, purchased in their own names, (but for the use of this lodge,) of Mrs. Catherine Kerr, unto the R. W. William Burbeck, upon condition that said Burbeck pay all sums of money due from this lodge to any person or persons. Also that the said Burbeck give good security, at the same time, to our brothers, Samuel Barrett, (and six others,) that, upon their repayment to said William Burbeck, his heirs, executors, or administrators, within ten years from the date of said deed, all such sum and sums of money as aforesaid, with the interest that shall be due thereon, he or they shall or will grant and reconvey the said house, land, and premises, free from all incumbrances, unto William Bell, Paul Revere, (and four others,) which shall be for the use of this lodge.

"Also, That Samuel Barrett, (and others,) give their obligations in writing unto William Bell, (and others,) that upon such repayment to said Burbeck, and his refusal to reconvey as aforesaid, they will sue the bonds given as aforesaid by said Burbeck, and pay all such sum and sums of money as shall be recovered and received therein, unto the treasurer of this lodge for the time being, which shall be to and for the use of the lodge.

On the 22d of February, 1768, William Burbeck executed his bond in the penal sum of eight hundred pounds, the condition thereof being as follows:—

"The condition of the above written obligation is such that, whereas Moses Deshon, Edward Foster, Samuel Barrett, Thomas Milliken, John Jenkins, Caleb Hopkins, and Joseph Webb, on the twentieth day of February, instant, for the consideration of four hundred pounds lawful money, granted and conveyed unto the said William Burbeck, and to his heirs and assigns forever, the dwelling house, land, and premises now known by the name of 'Masons' Hall,' in said Boston, bounded and described as by deed thereof to him at large appears; and whereas the said Burbeck has promised and agreed that, in case the said Barrett, Webb, Warren, Collins, Danforth, Crafts, and Proctor, or either of them, or either of their heirs, executors, or administrators, shall, at any time within *ten* years from the twentieth day of February, instant, pay unto him, his heirs, executors, and administrators, the sum of four hundred pounds lawful money, with lawful interest from that time to the time of payment, that then he, the said Burbeck, or his heirs, executors, or administrators, will execute and deliver a good deed of bargain and sale of the dwelling-house, land, and premises before mentioned, unto William Bell, William Wingfield, John Symmes, John Gore, Jr., John Lowell, Thomas Chase, and Paul Revere, to hold to them, their heirs and assigns forever, free of all incumbrances, to and for the use of the Freemasons' Lodge in said Boston, known by the name of 'Saint Andrew's Lodge;' and will also repay all such moneys as he shall have received as rent for said dwelling-house and land for the use of said lodge. Now, if the said William Burbeck, his heirs, executors, and administrators, shall and do perform, fulfil and accomplish his promises and agreements before mentioned, then this obligation to be void, but in default thereof to remain in full force."

On the 10th of March, 1768, the lodge, by a series of votes approved and ratified "the whole transactions of the committee in the affair of the house," and appointed certain of their members to have the management of the property.

On the 26th of December, 1777, William Burbeck executed and delivered his deed of that date, of the premises in question, which are described in the deed by metes and bounds,

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‘and all such flats, ways, passages, and privileges, and appurtenances as are thereunto belonging,” in consideration of the sum of four hundred pounds, “to have and to hold the aforegranted premises to them the said William Bell, John Symmes, John Lowell, Thomas Chase, and Paul Revere, and to the survivors or survivor of them, in trust to and for the use of the Freemasons’ Lodge in said Boston, known by the name of the St. Andrew’s Lodge, to their only proper use, benefit, and behoof forever.”

It is agreed that, since the last-mentioned deed, the grantees named therein, and the survivors of them, and persons claiming by deed under them, including the tenants in this action, have had actual possession of the premises, claiming to hold and own the same in fee-simple, in trust for the lodge, and that the net rents and profits of the estate have been applied, under the orders of the lodge, for charitable purposes.

Paul Revere, the survivor in the deed of December 26, 1777, died May 10, 1818.

The demandant claims as heir of William Burbeck, who died in August, 1785, leaving several heirs, of whom John Burbeck, the father of the demandant, was one.

William Burbeck, by his last will, after giving to certain grandchildren, the children of his two deceased children, two shares in his real and personal estate, gives to his five surviving children, of whom John Burbeck was one, all the remainder and residue of his estate, both real and personal.

John Burbeck died February 1, 1819.

The demandant was married to Gedney King in 1806. Gedney King died in August, 1839.

The tenants claim to hold the premises as the trustees of St. Andrew’s Lodge, which is a voluntary association of Freemasons, holding a charter originally under the Grand Lodge of Scotland.

It is further agreed, that the court may draw all inferences, and make all the presumptions from the above facts that a jury would be warranted in doing. Judgment to be entered for the demandant or tenants as the court may determine; but if for the demandant, entry thereof to be suspended to allow

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the tenants to file a bill in equity against the demandant, to compel a conveyance of the title.

C. B. Goodrich and H. L. Hazelton, for the demandant.

William Burbeck, by his deed of December 26, 1777, conveyed a life estate to William Bell, John Symmes, John Lowell, Thomas Chase, and Paul Revere, and to the survivor of them, which estate was determined May 18, 1818, by the death of Paul Revere, the survivor of the above named grantees.

At the death of Paul Revere, the original estate, by right of entry, under the residuary clause of the will of William Burbeck, or by descent from him, vested in his son, John Burbeck, the father of the demandant, which right of entry continued until the decease of John, February 1, 1819.

The demandant, at the decease of her father, John Burbeck, was under coverture of Gedney King, and so continued until his decease in August, 1839.

The right of entry which first accrued at the decease of Paul Revere, May 18, 1818, to John Burbeck, continued in him some nine months, and has been available to the demandant since her disability of coverture was removed, to the date of the writ, some ten years; so that she had a right of entry at the institution of her suit.

The demandant contends, that the statutes of this commonwealth, relating to the owners of land in common and undivided, in force in 1777, did not apply, and could not apply, to St. Andrew's Lodge, or its supposed agents or trustees; and also, that a title cannot be acquired by disseisin, made or continued during the legal disability of the party in whom is the legal title or a legal right of entry.

R. Choate and S. Bartlett, for the tenants.

By the well settled rules of law, the estate conveyed by the deed of Burbeck to Bell and others must be commensurate with the equitable estate of the *cestui que trust*. *Brooks v. Jones*, 11 Met. 191; *Gould v. Lamb*, 11 Met. 84; *Stearns v. Palmer*, 10 Met. 32; *Newhall v. Wheeler*, 7 Mass. 189; *Bridge-water v. Bolton*, 6 Mod. 108, 111; *Lewin on Trusts*, 141; *Fisher v. Field*, 10 Johns. 495; 1 Spence Eq. Jurisdiction, 587.

The case finds that the constitution of the lodge provides that its whole income, including the rents of the premises in question, should be devoted to the relief of its poor members and their families, and that it has been uniformly so applied. This use is in its character a perpetuity, and not one that could be effected by a life-estate merely in the grantees of Burbeck. Again, the trusts or uses on which this estate was held, are settled to be charitable uses, and will be upheld and perpetuated as such. *Duke v. Fuller*, 9 N. H. 536; *Vander Volgen v. Yates*, 3 Barb. Ch. R. 242; *Babb v. Reed*, 5 Rawle, 151; *Washburn v. Sewall*, 9 Met. 280.

SHAW, C. J. This is an action of ejectment, brought to recover an undivided part of the estate long known as the Green Dragon Tavern estate. Mrs. King claims as one of the heirs of her grandfather, William Burbeck, who died in August, 1785, through her father, John Burbeck, who died in 1819. At the time of the decease of her father, the demandant was a *feme covert*, being the wife of Gedney King, who died in August, 1839. The ground of the demandant's claim of title is, that her grandfather, William Burbeck, from whom both parties claim, was seised of the estate in fee, and, on the 26th December, 1777, executed a conveyance thereof to William Bell and four others, and the survivor of them, as joint tenants, but without words of limitation to their heirs, or to the heirs of the survivor; that this vested an estate for life only in the grantees, and the last survivor; that this left a reversion in William Burbeck, which descended to his heirs, or passed to them by the residuary clause in his will. Paul Revere, the last survivor of the said grantees, died May 10, 1818. The claim is, that, at that time, a right of entry vested in John Burbeck, which, on his decease, a few months afterwards, descended to his heirs, one of whom was the demandant; that she was then under the disability of coverture, and so continued until 1839, when her husband, Gedney King, died; and within ten years from that time this action was brought.

The question depends upon a rule of strict law, and stands on grounds purely technical. It is this: that, by a rule of the common law, a deed to one or several persons, named, with-

out limitation to heirs, or words of limitation, conveys a life-estate only ; so that a reversion remains in the grantor, which may pass by descent or devise to his heirs or devisees.

How far the construction of this deed might be aided or affected by a bond previously given by the grantor, and in pursuance of which this deed was given, perhaps it is not necessary particularly to consider. The circumstances may be briefly stated. The purchase of the Green Dragon Tavern, for the use of the masonic fraternity, seems to have originated with St. Andrew's Lodge, by a vote in 1764. A purchase was made of the estate in question, by a deed in fee from Catherine Kerr to Thomas Milliken, Moses Deshon, and others, for the use of the lodge. In 1768, a vote passed by the lodge desired the holders of said bond to convey the same to R. W. (Right Worshipful) William Burbeck, on condition that he advance and pay all moneys due and owing from the lodge, &c., stated and fixed afterwards in the deed at £400 ; and on further condition, that he should give a bond to William Bell and others named, with a condition, that if said Bell and others, the obligees, should repay him the £400 within ten years, and all such sums of money, &c., he, the said William Burbeck, should reconvey the premises to William Bell, Paul Revere, and four others, for the use of the lodge.

The better and more effectually to secure the performance of this obligation to reconvey, for the use of the lodge, as there was then no court of equity, to enforce a specific performance, or carry into effect a trust, and as a lodge is not a corporation having capacity to sue in its own name, the vote further provided, that said Barrett and others, to whom the bond of Burbeck was to be given, should give their obligation in writing, to William Bell, Paul Revere, and others, stipulating that if, upon repayment, said Burbeck should refuse to reconvey, according to his bond, to said Bell and others, then that they, obligees of Burbeck, would sue his bond, and pay all such sums of money as they should recover thereon, to the treasurer of said lodge for the time being, for the use of the lodge.

On the 22d, four days after this vote, said Burbeck did execute a bond to Barrett and others, in the penalty of £800, with a condition reciting the conveyance of the premises to him in fee, by a deed of Moses Deshon and others, dated the 20th, and reciting his promise and stipulation, on receiving such conveyance, to execute a bond to reconvey to William Bell and others, to hold to them and their heirs, to the use of the lodge called St. Andrew's Lodge, and to account for the rents and profits thereof; it then provides, that if said Burbeck, his heirs, &c., shall fulfil and perform said promise and agreement, his bond should be void, otherwise, in force. Within a few weeks after, votes were passed by the lodge, expressing their satisfaction with these transactions, their thanks to Moses Deshon and others, for their good services, and appointing Burbeck, Barrett and others to transact the whole of the affairs of the house, and giving directions and advice in regard to their management.

Thus the matter stood during nearly the term of ten years, contemplated by the bond, viz: until December, 1777, when the deed was executed, upon the construction of which this question depends. This deed is set forth at large in the agreed statement of facts. It recites the payment of £400 lawful money, by William Bell and the others named in his bond, and in consideration thereof, conveys to them the estate (described) with the buildings and flats, passages, privileges, and appurtenances, to hold to them and the survivors and survivor of them, "in trust to and for the use of the Freemasons' Lodge in said Boston, known by the name of St. Andrew's Lodge, to their only proper use, benefit, and behoof forever." Did this deed pass a fee, or a life-estate only, to the grantees?

It is argued by the tenants, that Burbeck never had an absolute title to the estate; that, simultaneously with the deed of Deshon and others to him, he gave a bond to reconvey and account, &c., on payment of a sum of money and interest. It is obvious that the conveyance to him had a twofold object, the first to secure to him the reimbursement of his advances for the lodge, and then to hold for them, because they had not capacity to take and hold real estate.

Had the transaction been in legal effect what it purports to be in words, a conveyance to him, with a simultaneous bond, both to reconvey to the same persons on payment of a sum of money, it would have been a defeasance, a grant defeasible upon a condition subsequent; so that, upon a performance of the condition, all the estate granted to him, be it a life-estate or a fee, would be divested, and again vested in the grantors. But it was not a bond to *re-convey*, that is, to convey to the same persons, but to other persons, to the beneficial uses of the same body from whose trustees it came to him, to wit, the lodge. But though this conveyance to other persons than the grantors cannot in law operate as a defeasance, it must have been intended to have the same effect.

It certainly seems, that when both the purposes for which it was conveyed to him had been accomplished, when he had been reimbursed his whole advances, and held the estate for the unincorporated body, to supply their want of capacity to hold real estate, and when, pursuant to his obligation, he was conveying the estate to other trustees, to hold the estate for the same *cestuis que trust*, it was to be expected that he would transfer all the title he had taken. Indeed, it is strongly argued on the part of the tenants, that, as Burbeck was under obligation, legal as well as equitable, on receiving the full amount of his dues, to convey the whole estate to the use of the real beneficiaries, that it was his intention to do so. But it is answered, on the other hand, that, even if it were admitted that he intended to do so, if he has not executed such an instrument as will be sufficient in law to pass an estate in fee, his intention is unexecuted and cannot avail. This question we have not found it necessary to decide, and therefore we give no opinion upon it; there is another ground which we think decisive.

Assuming, then, as the rule of the common law, that a conveyance of an estate to one or more, without words of limitation to heirs, by deed, creates a life estate only, though very much relaxed in its application to devises by will, this rule is to be taken in connection with other well established rules of law. It is a general rule, that a deed of conveyance,

like other instruments, is to be construed according to the intention of the makers, subject only to certain rules necessary to the uniformity and certainty of the law ; which are, that such intention is to be a legal, not an arbitrary intention, — such an intention as may be inferred from the use of terms which have acquired a legal signification ; and further, that the intention can be carried into effect without a violation of the rules of law. Subject to these restrictions, the intention to be derived from the whole deed, construing every part and clause with reference to every other part, will govern.

In thus ascertaining the intention, in order to the construction of a deed, the object and purpose apparently intended to be accomplished by it will be taken into consideration, as well as the general and technical terms of it. Thus, after the *St.* 1785, *c.* 62, § 4, directing that grants or devises to two or more shall be deemed to be estates in common, and not in joint-tenancy, unless it shall therein be said that the grantees are to hold as joint-tenants, or to the survivor or survivors, or unless other words are therein used, showing it to be the intention of such grants or devises that the land should vest as joint estates, and not estates in common. Since the passing of the statute, it has been frequently held, that when words are used which, in their ordinary import and by force of the statute, would create a tenancy in common, they shall yet be held to create a joint estate, if such construction will best subserve and carry into effect the obvious purpose of the deed, manifested on its face, by express words or necessary implication. The terms which manifest such an intention are "other words," within the meaning of the statute, manifesting an intention that the same shall vest as a joint estate. Therefore, where the words of conveyance in a mortgage would create a tenancy in common, it would be held to be a joint tenancy, if apparent on the face of it that it was made to secure a joint debt. Inasmuch as the debt would survive, it would best subserve the intention of the parties to hold the collateral security on real estate to be a joint tenancy, because the security would then survive and follow the debt to be secured. *Appleton v. Boyd*, 7 Mass. 131 ; *Goodwin v. Richardson*, 11 Mass. 469

Another rule, quite analogous in principle, but more directly applicable to the present case, is, that where an estate is granted to two or more persons, in trust, and the trusts expressed in the same deed are of such a nature that an estate in fee in the trustee is necessary to support them, it shall be held that an estate in fee was intended, though the words of conveyance, independent of such trust, would pass an estate for life only. The reasoning from which this conclusion is drawn is simple and satisfactory. The grantor has an estate in fee, and, of course, a general power of disposing; the leading object of creating the legal estate is, to uphold the trust and carry it into effect; this is manifested in the conveyance itself, and therefore the law infers that the grantor, by the execution of the deed, intended to effect and did effect a conveyance in fee.

This point has been so recently decided in this court, and the authorities, both English and American, cited in support of it, that it seems unnecessary to do more than add, that, upon a revision, we are satisfied that it is correct. *Cleveland v. Hallett*, 6 Cush. 403.

The conveyance in question, of William Burbeck to William Bell and others, as joint tenants, but without words of inheritance, was made to hold in trust for the use of the free-masons' lodge in Boston, known by the name of St. Andrew's Lodge, to their own proper use, forever.

It is no objection that, at that time, there was no court of equity in Massachusetts, to enforce a trust specifically. It is a question, not of remedy, but of construction; what did the grantor intend? If he intended it to support a trust in its nature perpetual, then he intended to give a legal estate in perpetuity to sustain it. Such a trust would be equally binding upon the consciences of the grantees, whether any court of justice could afford a remedy or not; and the grantor could have no reason to suppose that a trust would not be faithfully executed, without regard to legal compulsion.

Then the remaining question is, whether the trust thus declared is in its nature perpetual. This lodge, as appears by the evidence, was constituted under what is called a charter

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from the grand lodge of Scotland. It appears by evidence, as well as by general notoriety, that a masonic lodge is a voluntary association of persons, closely united by rules, usages, and ceremonies, maintaining a perpetual succession, by the admission of new members; and, whatever other objects they may have, one leading one is that of charity, supporting the poor and indigent members, their widows, and orphans. This object is essentially perpetual, for "the poor ye have always with you."

Nor is it an objection, that the association who are designated as the beneficiaries, to manage its funds and administer its charities, is not incorporated. To take and hold legal estate directly, to maintain actions as an aggregate body and in a name of association, incorporation is necessary. But a voluntary association, meeting and acting under a common name, for a common object, especially a charitable one, duly organized by choosing officers, keeping written minutes of their votes and acts in nature of a record, and thus being capable of being designated and identified by proof, is a body capable of being the beneficiaries of such a trust, though not incorporated. *Tucker v. The Seaman's Aid Society*, 7 Met. 188, 200; *Washburn v. Sewall*, 9 Met. 280.

The court are of opinion, that the body called St. Andrew's Lodge was such a voluntary association, capable of being designated, identified, and ascertained by legal proof, so as to satisfy the above conditions, and a trust for their use was in its nature perpetual; and, therefore, that the grant upon such trust was a conveyance in fee to the trustees.

Judgment for the tenants.

ELEAZER F. PRATT & others vs. WILLIAM P GIBBS.

A bond to a creditor by a third person only, with condition like an ordinary prison bond, under the statute, though invalid as a statutory bond, is a good bond at common law

DEBT on a bond. It was submitted to this court on an agreed statement of facts.

The plaintiffs recovered judgment against William Gibbs, the father of the defendant, at the court of common pleas holden at Boston, within and for the county of Suffolk, on the first Tuesday of January, 1848, for the sum of two thousand seven hundred and fifty-eight dollars, and eleven cents debt, and seven dollars and twenty-six cents costs of suit, upon which judgment execution issued, bearing date March 4, 1848. Upon this execution, William Gibbs was arrested and duly committed to the commonwealth's jail at Concord, in the county of Middlesex, on the 27th day of March; and on the same day he was discharged from confinement, on giving a bond for the prison limits, in the usual form, executed by himself as principal, and two sureties duly approved by two justices of the quorum, as by law is required. On the same day, he gave notice of his desire to take the poor debtor's oath, and the thirtieth day of March was fixed upon for the examination under the statute, and notice thereof was duly served on the plaintiffs. At the appointed time and place, the examination commenced, but, before it was concluded, it was agreed between the creditors and debtor, that the plaintiffs should take a bond duly executed by William P. Gibbs, the defendant, with the same conditions usually annexed to a bond for the prison limits, and that, thereupon, the plaintiffs should release the sureties upon the prison limits bond, by a sealed release in due form. The plaintiffs executed a release accordingly, and William P. Gibbs executed a bond according to his agreement, being the bond on which this action was brought.

The proceedings at the examination were adjourned to the 27th day of April then next, and afterwards to the 23d day of May then next; and, William Gibbs not appearing at the time and place of the last adjournment, no further proceedings were had.

After the execution of the bond, the debtor went at large without the exterior limits of the prison, and never instituted any other proceedings for his discharge, and never has surren-

dered himself to the jailer, nor been surrendered to be held in close confinement.

Upon the foregoing statement of facts, the case is submitted to the whole court for their adjudication, as to them shall seem meet, and law and justice may require. If the court shall be of opinion that the bond declared on is not wholly void, and that the defendant has a right to show the actual damage sustained by the plaintiffs, the case is to be sent to a jury for the assessment of damages under the direction of the court.

J. Lowell, for the plaintiffs, cited *The Bank of Northern Liberties v. Cresson*, 12 S. & R. 306; *Thom v. Savage*, 1 Blackf. 51; *Keene v. Deardon*, 8 East, 298; *People v. Judges of Dutchess County*, 5 Cowen, 34; *Clap v. Cofran*, 7 Mass. 98; *Freeman v. Davis*, 7 Mass. 200; *Burroughs v. Lowder*, 8 Mass. 373; *Bartlett v. Willis*, 3 Mass. 86; *Flagg v. Tyler*, 3 Mass. 303; *Hall v. Cushing*, 9 Pick. 395; *Glezen v. Rood*, 2 Met. 490; *Posterne v. Hanson*, 2 Saunders (Wms.) 59 a, n, St. 23 Henry VI. c. 9, in Vin. Abr. Bail, E; *Raven v. Stockdale*, Vin. Abr. Bail, F; *Johns v. Stratford*, Cro. Car. 309, *Hall v. Carter*, 2 Modern R. 304; *Benson v. French*, Lat. 98 Sid. 132.

G. H. Preston, for the defendant.

If the instrument declared on is any thing, it is a bond for the prison limits, but it is invalid as such a bond, because not executed by William Gibbs, the person committed on execution. *Clap v. Cofran*, 7 Mass. 98; *Clapp v. Hayward*, 15 Mass. 276; *Simonds v. Parker*, 1 Met. 508. It is also invalid at common law; for, though bonds varying in some respects from the requisitions of the statute have been held to be good at common law, yet, in all those cases, the parties to the instrument are right, while in this case they are not right. *Bean v. Parker*, 17 Mass. 591; *Purple v. Purple*, 5 Pick. 226; *Bull v. Clarke*, 2 Met. 587.

This bond is in the nature of a wager, and is void as against public policy, for various considerations.

DEWEY, J. This bond is not in conformity with the statute regulating ordinary prison bonds, and, as a statute bond, could

not be held to be good and effectual. The plaintiff does not rely upon it as such, but insists that it is a good bond at common law; and the only question raised is, whether it can be enforced as such.

This bond does not fall within the class of cases where public officers have taken bonds under color of office, but in a manner not conformable to law. Of this class are the numerous cases of bonds and written promises to a sheriff, having a precept authorizing an arrest, which have been held void, as contrary to the statute 23 Henry VI. c. 10, regulating bail in civil cases, as in *Denny v. Lincoln*, 5 Mass. 385; or in replevin, as in *Purple v. Purple*, 5 Pick. 226.

The distinction between bonds given directly to the officer by the debtor, and bonds and other contracts with a creditor, given by his debtor while liable to arrest, or actually imprisoned, is one well maintained by the authorities, and rests on sound principle. The sheriff has an official character, and can only act in that character, in conformity with the statutes, so far as they regulate his proceedings; and such is his relation to the debtor against whom he holds process, that the debtor may invoke the aid of the law to hold the sheriff strictly to the exercise of the authority conferred upon him by law, in all bonds or contracts taken by him of the debtor, for the purpose of either saving himself from arrest, or to obtain his liberty, if under arrest and imprisonment. The interest of the creditor also may alike require the proceedings of the sheriff to be strictly within the statute requirements. Such bonds are therefore open to the inquiry, whether they are conformable to the statute. But a bond from the debtor to his creditor, given under an arrangement made for their mutual convenience and interest, although such debtor may be in prison, is a mere common law bond, and the party is liable as on any other bond at common law, and the same is open to the ordinary defence that would apply to other common law bonds.

This principle seems to be recognized by the court, in the case of *Clap v. Cofran*, 7 Mass. 98, where the bond was not in conformity with the statute; but it was held, "if a debtor

in execution will voluntarily, and without fraud, imposition, or duress, give a bond to his creditor, conditioned that he will continue a true prisoner and not escape, such bond is not void at common law or by any statute." In *Hall v. Carter*, 2 Modern R. 304, it was held, that a bond to the creditor, by a third person, conditioned that a person arrested shall give certain security named, or surrender himself on such a day, is not within the statute of Henry VI. c. 10, as to taking bail. In *Lent v. Padelord*, 10 Mass. 230, an officer holding an execution against a judgment debtor, a third person gave the creditor a written promise that the debtor should surrender himself on a certain day specified, or pay the debt, and this was held a legal contract. We see nothing in the subject matter of this bond that should require us to treat it as invalid as a bond at common law.

But it is further contended, that this bond was not duly executed, and that for this cause it cannot be enforced. It is said, that the bond was only executed by the surety and not by the principal. Had this bond been drafted as a bond of William Gibbs as principal, and William P. Gibbs as surety, and been only executed by the surety, it might, perhaps, have been objected, that the bond was not duly executed, that it contemplated a bond of the principal, and that the surety was only to be bound if the principal was also bound. Such was the case of *Bean v. Parker*, 17 Mass. 591.

But this case differs from that class of cases. This bond does not purport to be a bond from the debtor as principal, with another person as surety for such principal. It is a bond from a third person, who is the only principal and only obligor named in the formal part of the bond. It is true that, in the recital, the obligor describes himself, "W. P. Gibbs as surety, am held and firmly bound." But this does not change the character of the bond, as to the proper parties to execute it, or as to its validity as against the obligor who executed it. *Bank of Northern Liberties v. Cresson*, 12 S. & R. 306; *Keene v. Deardon*, 8 East, 298.

This bond was, in our opinion, duly executed by the defendant, and is obligatory on him. *Judgment for the plaintiff.*

Loring, Judge v. Cunningham & others.

EDWARD G. LORING, Judge of Probate *vs.* THOMAS B. CUNNINGHAM & others.

A testator, before his decease, gave a bond to convey real estate, and took from the obligee an obligation to take the estate and pay the purchase money at a time stipulated; the testator executed and acknowledged a deed, but died before the time of payment arrived; when the day of payment arrived, the executor received the purchase money and delivered the deed; such money having been received by the executor on a personal obligation belonging to the estate, he is bound to account for the same.

Salary voted to a person after his decease, and paid to his executor, is assets of the estate, to be accounted for by the executor.

THIS was an action on a probate bond, against Cunningham, as executor of Samuel H. Hewes, and the sureties in the bond. The executor and one of the sureties were defaulted. The other surety denied the execution of the bond, and an issue thereon was submitted to the jury and found for the plaintiff.

The case was then submitted to a master, to ascertain the amount of the estate of Hewes, which had come to the hands of Cunningham, as executor, and for which he had not accounted. The master made a report, embracing several items, but only two items are contested. The first item is a sum of \$5,000, the facts in regard to which sufficiently appear in the opinion of the court.

The second item is a sum of \$250, with regard to which the master reports as follows:—

“ On behalf of the plaintiff, Mr. James C. Dunn, treasurer of the city of Boston, testified that, on the seventh day of July, 1845, he paid to the said Thomas B. Cunningham two hundred and fifty dollars, belonging to the estate of the said Samuel H. Hewes. He also exhibited a receipt of the said Cunningham for the said sum, signed with his name, but without the addition of ‘executor.’ He stated that he presumed the payment to have been for one quarter’s salary, due to the said Hewes as superintendent of burial grounds. The payment was made in the usual form, on a warrant or order from the city auditor, Mr. Elisha Copeland.

“ Mr. Copeland testified, that he gave the said warrant or

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order, and exhibited a record of the vote of the city council, authorizing the said payment, and the receipt of the said Cunningham as executor."

W. Dehon, for the plaintiff, cited *Wheelwright v. Wheelwright*, 2 Mass. 447; *Foster v. Mansfield*, 3 Met. 412.

H. L. Hazelton, for one of the defendants, objected to the allowance of both items; to the second, because it was a gratuity to the estate, and not a debt due to or assets belonging to the estate, for which the sureties should be liable.

FLETCHER, J. The first item is a sum of \$5,000, the facts in regard to which are briefly these.

Mr. Hewes, in his lifetime, made a contract with one Nathan Wheeler, to sell him a certain real estate in Boston. Mr. Hewes made a bond to convey; and Wheeler gave an obligation to take the estate and pay the purchase money at a time stipulated. Mr. Hewes also made a deed of the estate to Wheeler, which was duly acknowledged.

Before the time for the payment of the money, Mr. Hewes deceased. When the time arrived, Mr. Wheeler paid to Cunningham, the executor, the sum of \$5,000, according to his obligation, and Cunningham delivered to him the deed which had been duly executed and acknowledged by Hewes; Wheeler has since sold the estate.

Against charging the executor with this sum, it was argued, that the deed of Hewes, thus delivered after his decease, passed no title, and that the land still belonged to the estate, but that the money did not. On the other side, it was insisted that the deed, when made, was delivered to Cunningham as an escrow, and, when delivered after the death of Hewes, on the payment of the money, took effect from the time of the first delivery.

There was some evidence tending to show such a delivery as an escrow, and perhaps the circumstances might warrant such an inference; but, without settling that point fully, the court think that, as the executor received the money on a personal obligation belonging to the estate, he is bound to account for the money to the estate.

Now, as to the salary paid by the city. It was said, in

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behalf of the executor, that this sum was merely a gratuity and was not estate left by the deceased. But it was paid to the executor as the representative of Mr. Hewes, and to be held and accounted for by him, as belonging to the estate of Mr. Hewes. There was, surely, no intention to give it to the executor in his own right, and for his own personal benefit.

Report of the master accepted and affirmed, and judgment accordingly.

ORMOND DUTTON & others vs. GEORGE W. GERRISH.

In a general lease of a store, or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use.

Where a contract of hiring contains no warranty, express or implied, that the premises are fit for the purpose for which they are hired, evidence is not admissible of the declarations of the lessor to that effect, made at the time of the hiring.

THIS was an action of trespass on the case, the trial of which was commenced in this court before *Fletcher, J.* The case was taken from the jury by consent of parties, and reported for the consideration of the whole court.

The action was founded on an alleged breach of a supposed warranty by the defendant, that a certain building or warehouse, the lower floor and basement of which had been hired by the plaintiffs of him, was reasonably fit for occupancy and use as a dry goods warehouse, in the several stories thereof. To sustain the action, the plaintiffs introduced a written agreement between George W. Gerrish on the first part, and Dutton, Richardson & Co. on the second part, as follows:—
“That the first party agrees to let the warehouse, first floor and basement, in Federal street, next to that of S. Parsons & Co. for the term of five years from January 1, 1848, for the sum of eighteen hundred and fifty dollars per annum, payable quarterly, and to put the same in such repairs and order, with such

furniture as the party of the second part may require, and much in the same manner as that done for Messrs. Parsons & Co.; the party of the second part also to pay taxes; the party of the second part also agree to lease the store now occupied by them to the party of the first part, for the remainder of the term that said store is leased to the party of the second part, and at the said terms. It is also agreed, that the rent of neither store is to be paid by the contracting parties till from and after the 1st of April next.

The parties of the first and second part hereby agree to take said store, as above stipulated, and to make leases as soon as convenient. It is also agreed, that such furniture and fixtures as are now owned by D., R., & Co. may be removed or sold for their benefit. And it is also understood and agreed, that the quarterly rent and taxes of store in Water street shall be deducted from the quarterly rent and taxes of store in Federal street, and the excess only be paid by the parties of the second part to the parties of the first part; and also the parties of the first part agree to whitewash the walls reflecting the light in the store in the rear."

The plaintiffs then offered to prove that under and in pursuance of this agreement, they put their goods into the parts of the building specified in the agreement, and that, shortly after, the building fell down, by means of which the plaintiffs' goods were damaged to a great amount, for the recovery of which damage the suit was brought.

The plaintiffs further offered to prove that the building was a new, large building, the plaintiffs, and others who hired the other parts of the building about the same time, being the first occupants; that the defendant was a master builder, and that the building was erected by himself, and under his own direction and inspection, and was badly, improperly, defectively, and insecurely built, so that it was not reasonably fit for occupancy as a dry goods warehouse; and that, by reason of its being badly, improperly, defectively, and insecurely built by the defendant, all which was unknown to the plaintiffs, and could not be discovered by them, the warehouse fell down and broke up, and injured and destroyed the plaintiffs' goods.

The plaintiffs further offered to prove that, before the written agreement between the parties was made and entered into, one of the plaintiffs asked the defendant if the building was sufficiently strong; he replied that it was, and that he would warrant it would stand if filled with pig lead.

The plaintiffs did not charge or offer to prove any actual fraud on the part of the defendant.

The plaintiffs claimed that, upon the agreement between them and the defendant, and the proofs offered, they were entitled to maintain their action, upon the ground of an express or implied warranty by the defendant, that the building was reasonably fit for occupancy and use, as a dry goods warehouse.

On the part of the defendant it was insisted that, upon the agreement between the parties, and the proofs offered, there was, in point of law, no warranty on the part of the defendant, expressed or implied, on which this action could be maintained.

If the court are of opinion that the action cannot be maintained, then judgment is to be entered for the defendant, as on a statement of facts or on a nonsuit, as may be directed by the court. If the court are of opinion that the action can be maintained, then the case is to be sent to the jury for trial, open to any defence which the defendant may be able to make.

W. Brigham, (with whom was *R. Choate*.) for the plaintiffs.

The party agreeing to lease, in this case, impliedly warranted that the store was reasonably fit for the purpose for which it was leased, he being the builder and knowing its defects, the same being great. *Howard v. Hoey*, 23 Wend. 350; *Smith v. Marrable*, 11 M. & W. 5; *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, Ib. 68; *Salisbury v. Marshall*, 4 C. & P. 65; *Edwards v. Etherington*, Ryan & Moody, 268; *Collins v. Barrow*, 1 Moody & Robinson, 112; *Pickering v. Dowson*, 4 Taunt. 779; *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 Man. & Gran. 279; *Gardiner v. Gray*, 4 Camp. 144; *Gallagher v. Waring*, 9 Wend. 20; *Van Bracklin v. Fonda*, 12 Johns. 468; *Bluett v. Osborne*, 1 Starkie's R. 384; *Gray v. Cox*, 4 B. & C. 108; *Laing v. Fidgeon*, 6

Taunt. 108; Chitty on Con. 6th Am. ed. 440; 1 Cushing's Domat, 266; 1 Evans's Pothier on Obligations, 43-148.

H. F. Durant, for the defendant.

SHAW, C. J. The plaintiffs, in the present case, set out their claim, in seven different counts, in an action on the case. The *gravamen* of them all is, that, in the spring of 1848, the defendant, by a memorandum in writing, agreed to let to the plaintiffs the lower floor and cellar of a large warehouse, in Federal street, for the term of five years, at a rent of \$1,850 per annum. In some of the counts, it is alleged that the defendant falsely warranted the store or warehouse; and in others, that he falsely represented the same to be reasonably fit for occupancy; that he was the builder, that it was fit for occupancy as a dry goods store, that it was so strong that, if filled with pig lead, it would not break down; that to induce the plaintiffs to hire it, the defendant falsely warranted it to be strong and stanch, when, in fact, it was weak, negligently and improperly constructed, insufficient, and this well known to the defendant; that the plaintiffs, relying on such warranty and representation, did agree to hire the same, entered on the same, and removed their goods into it; that, by reason of the weakness, ill-construction and insufficiency of the warehouse, it fell down, by means of which their goods were greatly damaged.

We suppose it well settled by the authorities, that, although covenant or assumpsit, according to the form of the contract, would lie for a breach of a contract of warranty; yet, alleging such warranty to be false, case will also lie, so that counts on a false warranty may be joined in the same declaration with counts on a false representation. *Williamson v. Allison*, 2 East, 446; *Stuart v. Wilkins*, 1 Doug. 18.

Still, the question is, whether, in the first case, there appears to have been either a false warranty or false representation, upon which the action will lie.

At the trial, the charge of false representation, or fraud in fact, or an intention to deceive, was disclaimed, so that the only question remaining is, whether there is ground to charge the defendant with having warranted the warehouse to be strong and sufficient for occupancy as a dry goods store, when

in fact it was not in that condition. The right of action in this form is founded on the assumption that, if the defendant will warrant a fact to be true, without knowing whether it is true or not, even believing that it is true, but without knowing it, although he may have no intent to deceive, yet if, in fact, it is not true, and a third person, relying on such warranty, acts upon the faith of it and sustains damage, case will lie. 2 East, 446, cited above. Whether there was such warranty, therefore, must depend on the memorandum in writing, in which the entire agreement was contained.

Some question was made, whether this memorandum, somewhat informal, was to be regarded as a present demise, or for a term of years, or an executory stipulation for a lease to be made afterwards. In general, when one stipulates that another shall have the use, benefit, and enjoyment of real estate, definitely described, accompanied by an actual entry and enjoyment of the estate, this is evidence of a present demise. *Fiske v. The Framingham Manufacturing Co.* 14 Pick. 491. But perhaps this is immaterial, as the relation of landlord and tenant subsisted between these parties; and whether the plaintiffs were tenants for years or tenants at will, is not material to this action. Whatever species of tenancy subsisted, it was constituted by the memorandum in writing, and must be regulated and governed by it.

By this memorandum, the defendant agrees to let the warehouse to the plaintiffs, for the term of five years, &c.; to put the same in such repairs and order, with such furniture, &c. But there is no warranty, contract, stipulation, or undertaking, that the warehouse is strong, well built, suitably constructed, or fit for any kind of business whatever. There is, therefore, no express warranty, which was broken by the falling of the store.

And this court are also of opinion that there was no implied warranty in this memorandum, if, indeed, a breach of an implied warranty, equally with that of an express warranty, were evidence of deceit. It is not described as hired or intended for any specific purpose, or for any particular kind or branch of business; and, though it was known that the plaintiffs were

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dealers in dry goods, and would probably use the warehouse in that business, yet that is not expressed in the written agreement; and it would have been quite within the right of the lessees to use the estate for any other branch of business, or for a manufactory or dwelling house. It therefore does not come within the authority of cases, wherein furnished rooms, in a lodging house, are let for parlor, bedroom and the like, for a particular season of the year, in which a warranty may be implied that the rooms are properly furnished and suitably fitted for such particular use. *Smith v. Marrable*, 11 M. & W. 5.

But the authority of these cases has been much shaken, if not wholly overruled, so far as it applies to real estate, by the subsequent cases. *Sutton v. Temple*, 12 M. & W. 52; *Hart v Windsor*, 12 M. & W. 68.

If there was any warranty, express or implied, it was a part of the contract of hiring, and not something separate and independent, and must, therefore, be found as one of the items or terms of that contract. The evidence, therefore, offered for the purpose of showing that the defendant said to one of the plaintiffs, that the warehouse was strong enough to stand if filled with pig lead, was not admissible; it would be adding to the terms of a written agreement by parol evidence, which is contrary to the rules of law. The court are, therefore, of opinion, that the action cannot be maintained.

Plaintiffs nonsuit.

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DANIEL STONE vs. GEORGE ELLIS & another, Executors.

A deed, containing the following clause: "The above premises are subject to a mortgage thereof, by me given to the Massachusetts Hospital Life Insurance Company, dated April 11, 1840, recorded with Suffolk Deeds, Lib. 454, fo. 179, to secure the payment of six thousand dollars, with interest, and are conveyed upon the condition, that the said grantee, his heirs and assigns, do assume and pay the said mortgage debt, and all interest thereon, the same making part of the above consideration, and do indemnify and save harmless the said grantor, his executors and administrators, against the same forever," conveys the estate to the grantee as an estate upon condition in him and his assigns; and, if the condition be not performed, the grantor may enter for forfeiture of the estate, and the estate of the grantee may, by such breach of condition and entry, be wholly lost.

Where A. conveys to B. by deed, an estate upon condition, and at the same time B. mortgages the premises to A., who, on the non-payment of the mortgage debt at maturity, enters for foreclosure, and while he is in possession under such entry, a breach of the condition in his deed to B. occurs, such entry and possession, without further notice or act on the part of A., will not be sufficient to divest absolutely the estate of B. for such breach of condition.

The grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the condition annexed to his deed.

THIS was a bill in equity, brought to redeem a parcel of real estate, situate on the northerly side of Franklin street, in Boston. It was filed on the twenty-first day of December, 1849.

From the bill, answer, and replication, it appeared as follows:—

That, on the eleventh day of April, 1840, Ephraim Marsh, the respondents' testator, being seised in fee of the estate in question, mortgaged the same to the Massachusetts Hospital Life Insurance Company, to secure the sum of six thousand dollars, payable in three years from that date, with interest semi-annually; that Marsh continued in possession of the estate until the thirty-first day of December, 1844, when he conveyed the same to Asa B. Hogins, by deed containing the following clause: "The above premises are subject to a mortgage thereof, by me given to the Massachusetts Hospital

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Life Insurance Company, dated April 11, 1840, recorded with Suffolk Deeds, Lib. 454, fo. 179, to secure the payment of six thousand dollars with interest, and are conveyed upon the condition, that the said grantee, his heirs and assigns, do assume and pay the said mortgage debt and all interest thereon, the same making part of the above consideration, and do indemnify and save harmless the said grantor, his executors and administrators, against the same forever;" that Hogins, on the same thirty-first day of December, mortgaged the easterly half of the estate to Marsh, to secure the sum of three thousand dollars, payable in two years from date, with interest semi-annually; and on the same day, Hogins also mortgaged the westerly half to Marsh, to secure another sum of three thousand dollars, payable in two years from date, with interest semi-annually; that the mortgage debt to the Massachusetts Hospital Life Insurance Company became due on the eleventh day of April, 1843, and is still due at the present time, no part of the principal thereof ever having been paid by Hogins or his assigns; that, on the eighth day of December, 1846, Hogins mortgaged the entire estate to George Miller, to secure the sum of thirty-five hundred dollars, payable in one year from date with interest; that, on the fourth day of January, 1847, Marsh entered and took open and peaceable possession of the entire estate, for breach of the conditions of his two mortgages from Hogins, and that Marsh and those claiming under him have continued in possession ever since, receiving the rents and profits; that on the twelfth day of April, 1847, Marsh was obliged to pay to the Massachusetts Hospital Life Insurance Company the sum of \$360, being one year's interest then due on his mortgage; that, on the eleventh day of June, 1847, Miller assigned his mortgage to the complainant; that Marsh, after his entry on the premises as above recited, died, and the respondents were duly appointed his executors, and all the interest and estate which Marsh in his lifetime had in the premises, by virtue of his two mortgages and entry, became vested in the respondents.

The bill alleged that, by virtue of the mortgage from Hogins to Miller, and the assignment thereof to the complainant,

the complainant became entitled to redeem the estate, on payment to the respondents of the amount due on the two mortgages from Hogins to Marsh, and the costs and damages for non-payment of the same, after deducting the rents and profits received by Marsh in his lifetime, or by the complainant since his decease; that the complainant has ever been ready and willing to redeem and pay the amount due to the respondents as aforesaid, and, on the 22d day of December, 1849, the complainant requested the respondents to render him an account of the mortgaged estate, that he might redeem, but that the respondents refused to render him any account, pretending he had no right to redeem.

The prayer of the bill is, that an account may be taken, and the respondents ordered, on receiving from the complainant the amount due them thereon, to deliver up possession of the estate to the complainant, free of all incumbrances made by Marsh or the respondents, except the mortgage to the Massachusetts Hospital Life Insurance Company.

The answer alleges that Hogins, by virtue of his deed from Marsh, was seised of the estate in question, subject to a condition, which having been afterwards broken, has defeated the title of the complainant to the estate. It denies that the title which Marsh had to the estate under the mortgages from Hogins, and Marsh's entry, was all the title which Marsh had in his lifetime, or the respondents since, and now have in the estate. It alleges that Marsh in his lifetime, and the respondents since, have paid the interest due on the mortgage to the Massachusetts Hospital Life Insurance Company, to the amount of \$1,101; and that there is now due to that company, for principal and interest on their mortgage, the sum of \$6,324, for which the estate of Marsh is liable, and which the respondents, as executors, are bound to pay.

The answer admits the request of the complainant for an account, but denies that the respondents refused to render such account, and alleges, that the respondents, on such request, made out a just and true account, and, on the twenty-fourth day of December, 1849, presented the same to Henry H. Fuller, the complainant's attorney. It denies that the

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complainant ever offered to pay the balance due on such account, or that, if he had paid the same, he would thereby be entitled to redeem the estate; alleging that the complainant held the estate subject to the condition of the deed from Marsh to Hogins, and was bound to perform the same, but having neglected so to do, and Marsh having entered and taken possession of the estate and died seised thereof, and, the breach of condition having continued for a long space of time, the complainant had forfeited his title and had no right to redeem.

The answer prays that, if the complainant is allowed to redeem, he be decreed to pay, not only the amount due the respondents on the two mortgages from Hogins to Marsh, but also to pay off and discharge Marsh's mortgage to the Massachusetts Hospital Life Insurance Company.

G. H. Preston, for the complainant.

1. The words "upon the condition," &c., contained in the deed of Marsh to Hogins, dated December 31, 1844, are to be qualified by the circumstances of the case, and do not constitute such a condition as rendered payment of the mortgage to the Massachusetts Hospital Life Insurance Company by Hogins, necessary to give him an absolute title to the estate, so that a failure to make such payment would work a forfeiture thereof; but is of like meaning and effect with the clause usually inserted in deeds of real estate incumbered by mortgage, by which it is understood and agreed, that the grantee shall assume and pay the incumbrance, the amount thereof forming a part of the consideration for the conveyance. And this was manifestly the intention of the parties to that deed, taking the whole transaction together.

2. The entry of Marsh on the 4th of January, 1847, was for breach of the conditions of his two mortgages from Hogins, and for the purpose of foreclosure, and not because of forfeiture of the estate by reason of the breach of any condition contained in his deed to Hogins; and such entry is a waiver of any claim for forfeiture.

3. In any event, Hogins and those claiming under him, were entitled to a reasonable time to pay off the mortgage to

the Massachusetts Hospital Life Insurance Company, which, under the circumstances, they have not had. And the court will consider all the circumstances of the case, in deciding what is a reasonable time. *Carter v. Carter*, 14 Pick. 424; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Hayden v. Stoughton*, 5 Pick. 528; *Ross v. Tremain*, 2 Met. 495.

4. Grants are to be construed beneficially for the grantee, and forfeitures are not favored in law or in equity. 4 Kent's Com. 129, 130; 2 Story's Eq. Ju. § 1319.

5. Courts of equity will relieve and prevent a forfeiture for breach of a condition to pay money, where compensation can be made, and the amount of damages is certain and fixed, as in the present case. Com. Dig. *Chancery*, 2 Q. 3, 4, 5, 8, 9; 2 Story's Eq. Ju. § 1315 and note, 1316 and note, 1320, 1324; *Skinner v. Dayton*, 2 Johns. Ch. R. 526, 535; *Livingston v. Tompkins*, 4 Ib. 415, 431; *Harris v. Troup*, 8 Paige, 423; *Gray v. Blanchard*, 8 Pick. 284.

W. Minot, Jr., for the respondents.

1. The deed of Marsh to Hogins created a conditional estate in Hogins and his assigns. Coke on Littleton, §§ 328 and 331; Sheppard's Touchstone, 121; *Gray v. Blanchard*, 8 Pick. 284.

2. Marsh being in possession, and the breach of the condition known to Hogins, no entry, claim or demand was necessary to re-vest the estate in Marsh. Co. Lit. 218, a; Sheppard's Touchstone, 154; Viner's Abridgment, tit. *Condition*, R. d; *Lincoln and Kennebeck Bank v. Drummond*, 5 Mass. 321; *Hamilton v. Elliott*, 5 Serg. & Rawle, 375; *Bear v. Whisler*, 7 Watts, 144; 1 Smith's Leading Cases, (Hare and Wallace's notes to Dumpsor's case, Phil. ed. of 1847, 87.)

3. The condition is of such a nature that, the breach having also been wilfully made and long continued, relief will not be granted in equity. 2 Story's Eq. Ju. § 1323; *Hill v. Barclay*, 16 Vesey, 402; *Reynolds v. Pitt*, 19 Ib. 134; *Descarlett v. Dennett*, 9 Mod. 22; *Sparks v. Liverpool Water Works Co.* 13 Vesey, 428; *White v. Warner*, 2 Merivale, 459; *Bracebridge v. Buckley*, 2 Price Rep. 200, and *Rolfe v. Harris*, cited in the note; *Northcote v. Duke*, 2 Eden, 322,

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note; *Baxter v. Lansing*, 7 Paige, 350; *Ross v. Tremain*, 2 Met. 495.

4. If the complainant is allowed to redeem, it should be only on prompt payment of Marsh's debt to the Massachusetts Hospital Life Insurance Company, and of Hogins's mortgage, and of all costs and damages.

DEWEY, J. The respondents deny that Asa B. Hogins, under whom the complainant derives the title by virtue of which he seeks to obtain a decree authorizing him to redeem the real estate described in his bill, was ever seised in fee simple of the premises, but, on the contrary, affirm that the deed from Ephraim Marsh to him was a conveyance of an estate upon condition, which condition the grantee, Hogins, failed to perform, and, by reason of the breach of the condition, the estate was defeated, and the same wholly remains in Marsh, the grantor.

We have no doubt that the deed of Marsh to Hogins conveyed the estate to Hogins as an estate upon condition in Hogins and his assigns. It falls clearly within that class of cases.

To hold the condition in this deed a mere agreement of Hogins to pay the mortgage, would leave Marsh with nothing but the personal liability of Hogins for the payment of the amount due on the mortgage to the Massachusetts Hospital Life Insurance Company.

On the other hand, that this stipulation was not understood by the parties as embraced within the mortgage, is quite clear, as the condition of the mortgage is distinctly recited to be the payment of certain promissory notes therein described, and not the payment of this money due the Massachusetts Hospital Life Insurance Company. The security for the fulfilment of the promise of Hogins to pay that debt is found wholly in the condition attached to the deed of Marsh to Hogins. That deed was a deed upon condition to be performed by the grantee, and, if not performed, the grantor may enter for forfeiture of the estate, and, if such entry is properly made, the estate in Hogins may, by such breach of condition, be wholly lost.

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The only question of any difficulty in the present case is that which arises upon the question of the sufficiency of the entry of Marsh to divest absolutely the estate of Hogins for such breach of condition. It is not enough to show a mere breach of a condition subsequent. That alone does not defeat the estate. It is entirely optional with the grantor of an estate upon condition, in case a breach of the condition occurs, whether he will avail himself of the same as a forfeiture of the estate thus granted. To do this, requires action on his part, and the usual form is by an actual entry upon the party in possession, assigning, for the cause of such entry, the breach of the condition of the deed. Until this is done, the grantee holds his estate, liable only to be defeated, but not actually determined by a forfeiture.

The defendants admit the correctness of these general positions, but insist that Marsh made all the entry necessary to effect that object, and various cases are cited to sustain the doctrine, that Marsh, being in possession at the time, and the breach one that must have been known to Hogins, no further entry, claim, or demand was necessary to defeat the estate of Hogins, and give full effect to the forfeiture.

As it seems to us, such effect cannot attach to the mere possession of Marsh as to divest the estate, without any further notice or act on his part. Our familiar law, as to one class of forfeitures, is certainly quite to the contrary. I allude to the case of an ordinary mortgage to secure the payment of money at a stipulated time, but where, before the maturity of the note secured, or the time has arrived to perform the condition, the mortgagee has entered into possession, and, while thus in possession, the breach occurs, and the mortgagee continues in possession the period of three years thereafter, yet this will not be held to be that entry for foreclosure and three years' possession, that will bar the redemption of the estate. The mortgagee having entered for another purpose, and in the exercise of other rights, it shall not be allowed to operate as an entry to foreclose, until notice is given to the other party of such purpose, and that the possession is retained for that cause. *Erskine v. Townsend*, 2 Mass. 493; *Willard v. Henry*, 2 N. H. R. 120.

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In the present case, the entry was for a clearly defined and distinct purpose, namely, to foreclose the two mortgages made by Hogins to Marsh, and all the necessary steps were carefully taken to bar the right of redemption, after three years from the time of making such entry, and, among these necessary steps, one was that of maintaining three years' continued possession by Marsh. Before the making of this entry, which was January 4, 1847, no intimation had been given, that Marsh claimed an unconditional forfeiture of the estate, nor had any complaint been made, so far as appears, for any default of Hogins in not paying off the mortgage to the Life Insurance Company, although two years had elapsed since the making of the deed having the condition of paying that debt, which was then overdue, Hogins having paid only the accruing interest thereon. In this state of things, Marsh being in possession for another purpose, upon failure by Hogins to pay the interest on the debt to the Life Insurance Company, Marsh paid the same. Being thus required to pay the interest that had accrued for the preceding year, this was quite sufficient cause for entering upon the premises, to perfect a forfeiture for breach of the condition annexed to the deed. But we think that, to effect that object, something was necessarily required more than the actual possession of the grantor, holding directly and avowedly as a mortgagee under the same grantee.

Nothing having been done by Marsh beyond this, in the opinion of the court, the estate of Hogins was not lost at the time of filing this bill, by breach of the condition subsequent attached to his deed from Marsh.

Without expressing any opinion as to the effect resulting from wilful breaches of condition, or those of such a character as would require a denial of relief in a court of equity possessing full equity powers, we are of opinion, that, if the grantor in a deed upon condition, like this, being a mere stipulation to remove an existing liability to the Life Insurance Company, an arrangement really a mortgage, excepting in its forms, which are those of a deed upon a condition subsequent, the fact of possession in the grantor is not in all

cases to operate as an absolute perfection of the estate. The possession of the grantor may be, as it in fact was here, wholly *alio intuitu*. The entry of the grantor, by which he had the possession, was an entry, both in form and substance; an entry to foreclose the mortgages of Hogins, which mortgages were entirely dependent upon Hogins's having an estate to mortgage to Marsh. It is to be remarked, that the condition here was one not to be performed in any stated time. It was to pay a note of the grantor's, then over due. It was a condition for the payment of money, and presents a case where, if an action at law had been instituted by Marsh to recover the land, this court would have interposed by an injunction to stay proceedings, upon subsequent payment, as in *Atkins v. Chilson*, 11 Met. 112.

Whether the complainant under this bill, in the manner it is drawn, could have put in issue this question of title of the respondents by forfeiture, because Hogins did not perform the condition of his deed from Marsh, might be questionable, but it was open to the respondents to interpose that title, and if found to be an absolute forfeiture, and the estate of Hogins thereby divested, it would have been a good bar, and thus it becomes necessary to decide upon that title.

But the court are of opinion that, although the respondents cannot set up this breach of condition in the deed of Marsh, to defeat the complainant's bill, on the ground of title absolutely forfeited, yet it is competent for the respondents to set up this as a prior lien, attaching to the premises in controversy, and to insist that they ought not to be disturbed in their possession, until the debt due to the Massachusetts Hospital Life Insurance Company is paid. This condition of paying that debt is one that may be enforced against the land. As the respondents assert that lien, and now ask the court that, before they are compelled to surrender the possession to the complainant of the mortgaged premises, that lien should be removed, we think the respondents are entitled to retain the possession until that lien is discharged.

The complainant's bill to redeem will be sustained, upon his removing all incumbrances specified in the mortgages to

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Marsh, and also discharging Marsh's estate from all further liability to the Massachusetts Hospital Life Insurance Company, by paying the same, as stipulated in the deed from Marsh.

Decree accordingly.

HUGH RILEY vs. GEORGE W. GERRISH.

If a party, not the indorsee, places his name in blank on a note, before it is negotiated or passed, the holder may fill up the blank so as to charge such indorser as a joint and several promisor and surety.

In a suit by the payee of a promissory note, against one who indorsed it in blank at the time it was given, parol evidence is admissible to show the real nature of the transaction.

THIS was an action on a promissory note, and came before this court on an agreed statement of facts.

In December, 1846, the defendant, being indebted to the plaintiff, procured two notes, of five hundred dollars each, payable in one year, with interest semiannually, for value received, to the order of the plaintiff, dated December 16, 1846, and signed by William Canney. Each note was secured by a mortgage made by Canney to the plaintiff.

The plaintiff offered C. L. Hancock, Esq., then counsel for the defendant, whose testimony it is agreed would be as follows:—

That, on the 22d of December, the parties met at his office, for the purpose of adjusting the plaintiff's claim against the defendant; that the defendant wrote his name in blank on the back of each of the notes in question; that the witness, who was the defendant's counsel, instructed the defendant that this would make him an original joint and several promisor, and the defendant thereupon wrote over his name the words "as indorser;" that the plaintiff, on seeing the notes, refused to take them in this form, with the words "as indorser" on them, but wanted them as they were before; that the witness instructed the defendant, that erasing the

words "as indorser" would make him liable as an original joint and several promisor, as before; that, after the plaintiff's refusal to take the notes with the words "as indorser" on them, and after the instructions of the witness to the defendant, the words "as indorser" were erased, and the notes and mortgages were then delivered to and accepted by the plaintiff; that, after the business was consummated, and the plaintiff had received the notes and papers, but before he had left the witness's office, the plaintiff wrote his name over the erasure. This was in presence of the defendant, but nothing was said about it between the plaintiff and the defendant.

At the maturity of the notes, the plaintiff put them in bank for collection, but they were returned.

The defendant objects that he is a second indorser, and that it is not competent for the plaintiff to give evidence of the fact that it is agreed Mr. Hancock would testify to, to show that the defendant was a principal promisor, and is liable in this action.

If the court are of opinion that the facts are admissible in evidence, and, when admitted, will establish the plaintiff's claim, judgment is to be entered for the plaintiff; otherwise, he is to be nonsuit.

A. B. Ely, for the plaintiff.

The facts are admissible in evidence. 1 Greenl. Ev. §§ 277, 285-288; *Austin v. Boyd*, 24 Pick. 64; *Richardson v. Lincoln*, 5 Met. 201. They establish the plaintiff's claim. *Austin v. Boyd*; *Richardson v. Lincoln*, as above cited; *Samson v. Thornton*, 3 Met. 275; *Union Bank of Weymouth & Braintree v. Willis*, 8 Met. 504.

H. F. Duran, for the defendant.

The admission of Hancock's testimony would be in violation of the established rule of evidence, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. 1 Greenl. Ev. § 275. The case of *Austin v. Boyd*, 24 Pick. 64, was widely different from the present, and was not within the rule of contemporaneous evidence; the indorsement by the payee, in that case

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was not made at the same interview as the indorsement by Boyd, but a month later, when Boyd was not present.

The facts, if admissible, prove Gerrish to be a second indorser, and not an original promisor. *Pierce v. Mann*, 17 Pick. 244.

SHAW, C. J. This is a suit on one of those irregular indorsements of a negotiable note, not indorsed by the payee but by a third person. *Hunt v. Adams*, 5 Mass. 358; 6 Mass. 519; 7 Mass. 518.

The history of these notes is given in the case of *The Union Bank of Weymouth & Braintree v. Willis*, 8 Met. 504, in which Mr. Justice Hubbard takes a full review of the cases in Massachusetts.

However much it may be regretted that this irregularity was originally sanctioned, it must now be admitted, that the law is well settled in this state, that if a party, not the indorsee, places his name in blank on a note, before it is negotiated or passed, and so before it has acquired the character of a contract, this will warrant the holder in filling up the blank, so as to charge such indorser as a joint and several promisor and surety. The fact of intrusting such blank with another is evidence of an authority to fill up something over it, and the actual authority to fill it up in any particular form may be proved by evidence *aliunde*.

This power of filling up a blank is not arbitrary, but depends upon proof of the real negotiation; and the court will permit the blank to be filled in conformity with the authority as proved. *Hunt v. Adams*, *ubi. supra*.

And if filled up, in the first instance, in a manner not conformable to the truth, he will be permitted to correct it and fill it up anew. *Josselyn v. Ames*, 3 Mass. 274; *Austin v. Boyd*, 24 Pick. 64; *Nevins v. De Grand*, 15 Mass. 436.

Another question is made in the present case, whether parol evidence is admissible.

A distinction is to be made here between the case of a holder of a note not dishonored, taken in the due course of business and without notice of the facts affecting the indorsement, and notes when these facts are otherwise.

Every presumption is to be made in favor of the regularity of such note; and, for the sake of protecting negotiable instruments, it shall not be impeached by parol evidence, or any other evidence *aliunde*, arising from transactions between prior parties. *Putnam v. Sullivan*, 4 Mass. 45.

But in a case like this parol evidence is admissible:—

1. Because it is between original parties, and the real transaction may be proved; as, for instance, that it was an accommodation note, made for the accommodation of the indorser. *Wiffen v. Roberts*, 1 Esp. R. 261.

2. It presents a latent ambiguity. A blank name means nothing of itself; there must be evidence *aliunde*, to show what was the object and purpose of the indorser in thus writing his name in blank and delivering it to another, in order to give it effect.

3. Before the indorsement is filled up, the respective liabilities of the parties rest on a presumption of fact only; and this may be rebutted by parol evidence. *Austin v. Boyd*, 24 Pick. 64.

If there be an exception in favor of indorseees and holders of negotiable notes, taken in due course of business, without notice, this note was not so taken, and, therefore, is not within the exception.

Then, as to the facts as proved by the evidence. The transaction between these parties had closed. The defendant, when he put his name on the note, was advised that he would thereby charge himself, whereupon he added the words "as indorser;" then the plaintiff declined to take it.

The defendant, after being advised of the effect, struck out the words "as indorser," and delivered it as a blank indorsement, as it was at first, with full knowledge of its legal effect. Within the authority of the cases cited, we think the defendant became liable as promisor. *Judgment for the plaintiff.*

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MARGARET KEARNEY, Administratrix *vs.* THE BOSTON AND
WORCESTER RAILROAD CORPORATION.
BENJAMIN MANN, Administrator *vs.* THE SAME.

An administrator of a person killed by a collision on a railway, cannot maintain an action for such injury under *St.* 1842, c. 81, § 1, where the death of the intestate was instantaneous with the collision.

That statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or being entitled to bring it, to have died before exercising that right.

THESE were two actions for injuries sustained by the plaintiffs' intestates, while crossing the defendants' track. The trial in both cases was in this court, before *Bigelow, J.*, who ruled that the actions could not be maintained. The facts sufficiently appear from the opinion of the court.

G. E. Betton, for Margaret Kearney.

S. E. Sewall, for Benjamin Mann.

T. Hopkinson, for the defendants.

SHAW, C. J. These are two actions brought by administrators, to recover damages under the statute, for injuries done to the persons of their intestates, by the railroad cars of the defendants. *St.* 1842, c. 89, § 1.

In the latter case, the plaintiff's intestate was riding in a wagon, on a highway, across the railroad, when the wagon was struck by the cars and the rider was instantly killed. The writ contained a count for the injury to the wagon, but that was withdrawn by agreement of parties, and the plaintiff's counsel then stating that he expected to prove that the intestate died instantaneously from the effects of the collision, the presiding judge directed the jury to find for the defendants, which they accordingly did.

The other case is very similar to the one just described. The person injured there was a female, of the name of Ann Kearney, who was crossing the railroad, in Boston, upon a public highway or footway, when she was thrown down by

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the cars. The train passed over her side. A girl, who was standing in the doorway of a house, less than two rods from the place of the accident, saw her run over, and immediately ran to her. She saw her move her hands and feet slightly; but the deceased breathed only once after the arrival of the witness and gave no sign of consciousness. This witness then ran back towards the house, and, on her way, met another witness, who went with her to the fatal spot. The latter testified, that the deceased might have stirred a little after she arrived, but she showed no other sign of life, and appeared to be dead. The court, considering this also to be a case where the death was instantaneous, ruled that the action could not be maintained, and so instructed the jury, who thereupon returned a verdict for the defendants.

If these rulings and instructions were wrong, the verdicts are to be set aside, and new trials granted in both cases.

The question is, if these actions can be maintained. They could not at common law, because no actions for injury to the person survive the death of the person receiving them, and because the death of a human being cannot be complained of as an injury to third parties. This last point was decided in the cases of *Carey and wife v. The Berkshire Railroad Co.*, and *Skinner v. The Housatonic Railroad Co.*, 1 Cush. 475. The same point had been previously decided at a *nisi prius* term of this court, in Worcester, and was reserved for the whole court, but never brought before it. That was a remarkable case in some of its circumstances. A father and his son had married a mother and her daughter. The latter, the two wives, were riding together, and were killed by collision with a train of cars. The husbands brought their actions for damages for the loss of their wives, and the court ruled that the actions were not maintainable.

The point in this case depends upon the construction of the statute of 1842, c. 89, § 1: "The action of trespass on the case, for damage to the person, shall hereafter survive, so that, in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended, by or against his executor or administrator, in the same manner as if he were living."

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The statute supposes the party deceased to have been once entitled to bring an action for damages for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right. The question is, whether the provision cited applies to the cases before us. In the first case, where the casualty relied on as the cause of action, and the death of the party injured, were simultaneous, it seems clear that the right of action cannot survive. The case contemplated by the statute must be of such a nature that the party injured must himself have, at sometime, had a cause of action.

The cause of action must accrue during the lifetime of the party injured. Here there was no time, during the life of the intestate, at which a cause of action could accrue, because the life closed with the accident, from which a cause of action would have otherwise accrued.

A distinction is to be taken between cases thus brought by executors or administrators of the person injured, and cases where persons sue, who claim that their own rights have been infringed.

In the other case, there is somewhat more of difficulty, because there was, there, some slight manifestation of life after the injury. It cannot be pronounced so confidently, that the intestate did not survive at all, or that the death was equally instantaneous. This gives rise to a difficult question. What constitutes that termination or period of life, which is necessary to give the party's representatives a right of action? It is not necessary to go into a minute, metaphysical discussion of the question. We are to ascertain what the intent of the legislature was, when they passed the law. It is not to be supposed that they intended to make a distinction between a case where the death was so instantaneous that there was no manifestation of life whatever, and a case where there might be some slight spasmodic action of the body of the sufferer, to indicate that life was not quite extinct. That, we think, was not their intent. The distinction between life and death frequently depends upon the nature of the question before the court. In an indictment for homicide, for instance,

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if it were alleged that a mortal blow was given, and that, from its effects, the person struck instantly died, and the proof was that he died as nearly instantaneously as this woman when the cars passed over her, there is no doubt that such proof would sustain the allegation. In other cases, it has frequently been necessary to investigate very closely, and with the most minute accuracy, the circumstances of the decease of individuals, with reference to the exact moment of their death, relatively to each other. As where the right to an inheritance has depended upon the question, whether a parent or his child died first. The civil law, or, at least, the modern French law, provides certain arbitrary presumptions in such cases, founded on certain general principles of physiology. Where the question is between father and son, the father is supposed to be the more vigorous, up to the age of sixty years, and, after that period, the son, if he has arrived at the age of maturity. In England, where a father and son perished on the same galleys, evidence of all the circumstances affecting the question was allowed to be introduced; the slightest possible incidents were seized upon, and it was considered very important to ascertain which of the two appeared to struggle the longest. A far more interesting case was that of a mother and her child, who fell or jumped overboard at the same instant, from a shipwrecked vessel; the child being in the mother's arms. There, the law, recognizing the strong and deep-seated tenderness of the heart of a mother for her offspring, presumed that she held her child above water until her own breath was gone, and that, therefore, the child probably lived the longer of the two, thus reversing the rule derived from the relative strength of the father and son. But these are curious and speculative questions, having little direct bearing on the present case. In all of them, it became absolutely necessary to ascertain the relative duration of life, between two persons, one of whom, in contemplation of law, must have survived the other. The case before us, however, does not require these minute investigations. The statute must have a practical construction, and supposes a case where a cause of action accrued to the injured party in his lifetime, which, by

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force of the statute in question, devolved upon and vested in his personal representative, at his decease afterwards.

It was suggested that a person might receive a mortal blow, and still survive, in a comatose state, for weeks, or even months, without any thing that could be called consciousness. Such a thing may be possible, but it is not necessary to take it into consideration here. It is no question, how a right of action, devolved on him by operation of law, requiring no act or assent from, could have been presumed; the sole question is whether it accrued, and this depends on the question whether he survived. This case must be decided according to plain common sense, and the true meaning of the act. The question is, was the death instantaneous, or did the party injured live after the accident happened? It is in evidence, that there was only a momentary, spasmodic struggle, and the death instantaneous. This case must, therefore, follow the same rule with the other. There was no evidence for the jury which was competent to maintain the action; and the judge did right in so directing them. If left in doubt by the evidence, it would be a question of fact for the jury.

Judgment must be entered for the defendants, on the verdict, in both cases.

Judgment for the defendants.

BENJAMIN KING vs. THE BOSTON AND WORCESTER RAILROAD CORPORATION.

A master or principal is not liable to one servant or laborer, for the neglect of another servant or laborer, in the same general business or employment; and the fact that the servant injured is a minor, does not at all affect his legal rights.

The obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence.

THIS was an action on the case, in which the plaintiff, a minor, seventeen years of age, sues by his father, as his next friend, to recover damages alleged to have been sustained by

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him, by reason of an accident, occasioned by a defect in the switch, at the junction of the Brookline branch with the main track of the railroad of the defendants.

At the trial, which was in this court, before *Bigelow, J.*, it appeared that the plaintiff, a minor, with his father's consent was in the employment of the defendants, as an apprentice in their machine shop. At the immediate time of the accident however, he was acting as fireman to a locomotive, but without any additional compensation.

The plaintiff contended, that the accident was caused by the breaking of the joint of the switch rod, and that the same was insufficient for the purposes for which it was used, and of an improper construction, and that the defendants were guilty of negligence, in the construction of the rod and joint, for which they were responsible to the plaintiff in damages, although guilty of no misconduct or gross carelessness.

But, upon the foregoing facts, the judge having intimated an opinion that the plaintiff was not entitled to recover, even if the defendants had been guilty of the negligence contended for by the plaintiff, it was agreed by the parties, that the case should be taken from the jury and reported to the full court. If the court should be of opinion that the plaintiff could maintain his action, the case was to stand for trial on the merits; but if the court should be of the opinion that the plaintiff could not recover, a nonsuit was to be entered.

J. C. Park, for the plaintiff.

T. Hopkinson and *G. Morey*, for the defendants.

FLETCHER, J. There is no principle of law upon which this action can be maintained.

The fact that the plaintiff is a minor, does not at all affect his legal rights.

He went into the service of the defendants with the consent of his father, and was, therefore, lawfully in their employment. He had the same rights against the defendants that any other person employed by them had, and no more; and the defendants were under the same liability to him which they were under to their other workmen, and no more.

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The plaintiff can maintain his action, if at all, only upon one of two grounds; to wit, either that the plaintiff was injured by the neglect or want of care of some other person in the employment of the defendants, and that the defendants are responsible for such neglect; or that the plaintiff was injured by some neglect of the defendants themselves, for which they are liable to the plaintiff in this action.

That the plaintiff cannot recover on the first ground, is too clear for controversy.

The law is too well settled now to be questioned, that a master or principal is not liable to one servant or laborer, for the neglect of another servant or laborer, in the same general business or employment.

This was so held in *Farwell v. The Boston & Worcester R. Corporation*, 4 Met. 49; and the same doctrine has been held by this court in two subsequent cases. *Hayes v. Western R.* 3 Cush. 270; *Albro v. Agawam Canal Co.* 6 Cush. 75.

Since the decision of *Farwell v. The Boston & Worcester Railroad Corporation*, the same doctrine has been held in three English cases, and also by the supreme court of New York. *Hutchinson v. York, Newcastle, & Berwick R. Co.* 5 W. H. & G. 343; *Wigmore v. Jay*, lb. 354; *Seymour v. Maddox*, 16 Ad. & EL (N. S.) 326; *Brown v. Maxwell*, 6 Hill, 592; *Coom v. Syracuse & Utica R. Co.* 6 Barbour, 231.

The general principle is, that a person, entering into the service of another, takes upon himself, in consideration of the compensation to be paid to him, the ordinary risks of the employment, including the negligence of his fellow-laborers.

The cases referred to show very clearly the mischievous consequences of a different doctrine.

But the plaintiff further claims to maintain his action on the ground, that the injury to the plaintiff was caused by a defect in the original construction of the road, and that the defendants are liable for the consequences of such a defect.

It is maintained for the plaintiff, that the defendants are bound to furnish a safe road, and that they are liable for injuries happening in consequence of a defective road. It is not necessary, at this time, to consider particularly this posi-

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tion. As a corporation can act only through the agency of some individual person or persons, a question has sometimes been made, as to what particular officers or persons should be considered as the corporation itself, as distinct from the servants of the corporation, for the purpose of settling what should be considered as the neglect of the corporation itself, and not of its servants.

I am not aware that there has been any direct adjudication on this point. But, assuming that it is correct, as a general principle, that the responsibility as to the sufficiency of the road rests on the defendants themselves, still, their obligation, so far as respects those in their employment, would not extend beyond the use of ordinary care and diligence, and they would be held responsible only for the want of ordinary care and diligence. If a corporation itself should be held responsible to its servants, that the road, when first used, was safe and sufficient, yet keeping the road in proper repair afterwards would seem to be the work of servants or laborers, as much as any other part of the business of the corporation.

Now, the case distinctly shows that there was no want of ordinary care and diligence on the part of the defendants, and they are, in the terms of the report, expressly acquitted of gross negligence.

It is quite clear, therefore, that the plaintiff cannot maintain his action on this last ground, and that a nonsuit must be entered.

Plaintiff nonsuit.

THE FROSTBURG MINING COMPANY vs. THE NEW ENGLAND GLASS COMPANY.

A. the agent, in Boston, of the plaintiffs, doing business in Baltimore, received from the defendants a verbal order for a cargo of coal, to be shipped by the plaintiffs from Baltimore in a vessel drawing not more than ten feet of water, at a freight not over \$2.25 a ton. This order was duly forwarded by A. to the plaintiffs, and a cargo was shipped on board a vessel whose draught did not ex-

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ceed ten feet. A bill of lading was forwarded to A., and by him received in due course of mail, by which the cargo was consigned to A., or his order, for the defendants, and the freight was specified to be \$2.45 a ton. On the day the bill of lading was received, A. indorsed it to the defendants, and delivered it to them, together with a bill of the coal, in which the price was reduced 20 cents a ton, to offset the increase of freight beyond the limits of the defendants' order. The defendants promptly sent back the bill of lading, and refused to receive the coal. On the passage from Baltimore to Boston, the vessel in which the coal had been shipped, foundered, but was raised and repaired, and arrived in Boston, whereupon A. tendered the coal to the defendants, who refused to receive it. In an action for goods sold and delivered, in addition to the above facts, a usage of the coal trade between Baltimore and Boston was proved, by which, when coal is ordered in Boston from Baltimore, the delivery of it on board a vessel *consigned to the person ordering it*, was a compliance with the order, and the coal was thereafter at the risk of the party ordering it; but it was held, that there was, in this case, no actual or constructive acceptance and receipt of the coal by the defendants, to satisfy the statute of frauds.

THIS was an action of assumpsit for goods sold and delivered, to which the defendants pleaded the general issue. It was tried in this court before *Bigelow, J.*, and reported by him to the full court.

The facts are sufficiently stated in the judgment. If the court shall be of opinion that, upon the facts stated, there was a sufficient acceptance by the defendants of the coal, to satisfy the statute of frauds, the case shall be referred to an assessor, to determine the amount of damages, otherwise the plaintiffs shall become nonsuit.

I. J. Austin, for the plaintiffs, cited *Rev. Sta. c. 74, § 4*; 29 *Car. II. c. 3, § 17*; *Morton v. Tibbett*, 15 A. & E. (N. S.) 428; *Snow v. Warner*, 10 Met. 132; *Hart v. Sattley*, 3 Camp. 528; *Anderson v. Hodgson*, 5 Price, 630; Addison on Contracts, 71 *Clark v. Baker*, 11 Met. 186; *Hanson v. Armitage*, 5 B. & Al. 557; *Norman v. Phillips*, 14 M. & W. 277; *Irvine v. Stone*, 6 Cush. 508; *Acebal v. Levy*, 10 Bing. 376; *Coxe v. Harden*, 4 East, 211; *Stanton v. Eager*, 16 Pick. 467.

E. Buttrick, for the defendants, cited *Snow v. Warner*, 10 Met. 132; *Nicholle v. Plume*, 1 C. & P. 272; *Astey v. Emery*, 4 M. & S. 262; *Hanson v. Armitage*, 5 B. & Ald. 557; *Jordan v. Norton*, 4 M. & W. 155; *Shindler v. Houston*, 1 Comst. 261; *Johnson v. Dodgson*, 2 M. & W. 656; *Acebal v. Levy*, 10 Bing. 376.

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FLETCHER, J. This is an action of assumpsit for goods sold and delivered. Upon the trial, it appeared by the testimony of Mr. Addison Child, that he was the agent of the plaintiffs, who did their business in Baltimore, Maryland; that, about the 19th March, 1849, he received, from the agent of the defendants, who do their business in Cambridge and Boston, a verbal order for a cargo of coal, to be shipped by the plaintiffs from Baltimore, in a vessel drawing not more than ten feet of water, at a freight not over \$2.25 a ton. This order the witness forwarded to the agent of the plaintiffs, in Baltimore, and, on the 14th April, 1849, the cargo was shipped on board a schooner which drew, when fully loaded, nine feet and nine inches only.

By the bill of lading, the cargo was consigned to Mr. Child, the plaintiffs' agent, or his order, for the defendants. This bill of lading was forwarded by the plaintiffs to Mr. Child, and received by him, in due course of mail, on the 16th or 17th of April, and specified the freight to be \$2.45 a ton. On the day it was received, it was indorsed by Child, and together with a bill of the coal, left by him in the counting-room of the defendants' agent, who was at that time absent. As soon as the defendants' agent returned, he sent back the bill of lading and refused to receive the coal.

The said bill for the coal reduced the price twenty cents a ton, so that the freight on the same, to be paid by the defendants, need not exceed their limits of \$2.25 a ton.

On the passage from Baltimore to Boston, the vessel in which the coal was shipped foundered. After being raised and repaired, she arrived in Boston, when the plaintiffs, by their aforesaid agent, tendered the coal to the defendants, who refused to receive it.

It was proved on the trial, that, by the usage of the coal trade between Baltimore and Boston, when coal is ordered in Boston from Baltimore, the delivery of it on board a vessel consigned to the person ordering it is a compliance with the order, and the coal is, thereafter, at the risk of the party ordering it.

The defence is, that, according to the provisions of the

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statute of frauds, this being a contract for the sale of goods, wares and merchandise, for the price of fifty dollars or more, and there being no note or memorandum of the bargain in writing, the contract was not binding, unless the purchaser shall *accept* and *receive* part of the goods, or give something in earnest to bind the bargain, or in part payment.

There was nothing given in earnest, or in part payment. The only question is, whether the defendants did accept and receive the goods, or any part of them.

That there was no actual manual taking or occupation of the coal by the defendants, is quite clear.

As soon as the defendants' agent had knowledge that the bill of lading was left at his counting room, he forthwith sent it back to the plaintiffs' agent, and expressly refused to receive the coal. When the coal arrived and was tendered to the defendants' agent, he at once refused to receive it; so that the defendants have promptly repelled all attempts to make an actual delivery of the coal to them, and have promptly refused to accept and receive the coal, or any part of it.

But the learned counsel for the plaintiffs maintains, with much ability, that it is not necessary that there should be an actual manual taking or occupation of the coal, but that there may be a constructive accepting and receiving, and that the receiving on board the vessel was a sufficient accepting and receiving by the defendants.

The proposition of the plaintiffs' counsel, that there may be a constructive accepting and receiving, or a receiving without the actual manual occupation by the purchaser, seems to be well sustained by the authorities. Therefore, in many cases, it is made a question to the jury, whether the purchaser, by his mode of acting or forbearing to act, or by some acquiescence, has not accepted the goods, though there has been no actual manual taking and occupation of them by him.

The further proposition of the learned counsel for the plaintiffs, that the acceptance and receipt, to satisfy the statute of frauds, are not such as to preclude the purchaser from afterwards objecting to the quantity or quality of the goods, is

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certainly fully sustained by the case of *Morton v. Tibbett*, 15 Adol. & Ellis, N. S. 428.

This case, in this particular, differs from many previous cases, which are all carefully referred to and commented on by the chief justice of the queen's bench, in delivering the opinion of the court.

In *Morton v. Tibbett*, the receipt of the goods is considered as a substitute for writing, leaving to the purchaser the same right to object that the contract has not been complied with, which he would have if the contract had been in writing.

The other and most material proposition on behalf of the plaintiffs, that the coal, when delivered on board the vessel, was accepted and received by the defendants, within the provision of the statute, remains to be considered.

That a delivery to a carrier is not sufficient to satisfy the statute, as a general proposition, is undoubtedly true, and is very properly admitted by the plaintiffs' counsel. But it is maintained that the master of the vessel, under the particular circumstances of the case, was an agent to accept, to satisfy the statute, because, in the first place, he was a carrier nominated by the defendants. But the facts show, that the verbal order of the defendants was merely to have the coal shipped by the plaintiffs from Baltimore, in a vessel drawing not more than ten feet of water, at a freight not over \$2.25 a ton. No reference was made to any particular vessel or master. Even this very general order was not complied with by the plaintiffs, as the freight was \$2.45 a ton, instead of \$2.25, as was ordered.

This departure in the price of the freight would, perhaps, of itself, be sufficient to exempt the defendants from the liability to take and pay for the coal. But it is not necessary to put the case on that ground, or attach any importance to that point.

The order as to a vessel was very general, referring to no particular vessel or master, specifying only the draft of water and price of freight.

The master was merely a carrier, and the taking by him would in no sense, and upon no principle, be regarded as a receipt by the vendee.

The case of *Morton v. Tibbett* was much stronger than the present. There, the defendant himself sent a particular lighterman to receive the wheat. But the delivery to the lighterman was not considered to be a receipt by the vendee, though other acts of the vendee, tending to show an acceptance by him, were regarded as sufficient to justify a verdict for the plaintiff.

So, also, in *Bushel & others v. Wheeler*, which is reported in connection with *Morton v. Tibbett*, the vendee ordered the goods to be forwarded by a particular sloop. Yet the delivery on board the sloop was not regarded as a receipt by the vendee within the statute, though the subsequent acts and forbearing to act on the part of the vendee, were held to be sufficient to go to the jury, to find an actual receipt by the vendee.

It is, therefore, quite clear, that a delivery on board the vessel, in this case, cannot be regarded as a receipt, within the provision of the statute, by the vendee, on the ground that the defendant ordered the coal to be forwarded in that way.

But it is further maintained, for the plaintiff, that the master of the vessel was an agent to accept, within the statute, because the usage of trade made him such in the coal trade between Boston and Baltimore. The usage, as shown, was, that, when coal is ordered in Boston from Baltimore, the delivery of it on board a vessel, *consigned to the person ordering it*, is in compliance with the order, and the coal is, thereafter, at the risk of the party ordering it.

It does not, in terms, appear, whether or not this usage applies to mere verbal orders, which are invalid by the statute of frauds.

Nor is it shown upon what ground this usage can be set up and maintained, against established provisions and principles of law. Upon general principles of mercantile law, when a person accepts a written order, and delivers goods on board a vessel according to the order, consigned to the person ordering them, in common form, they are then, of course, at the risk of the consignee.

When orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed and forwarded, the seller is *functus officio*, and can do nothing more, except so far as he may have a right of stoppage *in transitu*.

It is unnecessary to consider how far there could be any usage affecting the rights of the parties in this case, as it is quite clear that the case is not within the usage set up and relied upon. The usage is said to be, that, when coal ordered is delivered on board a vessel *consigned to the party ordering it*, that is a compliance with the order, and the coal is, thereafter, at the risk of the party ordering it.

But, in the present case, the coal was not consigned to the party ordering it, but, on the contrary, was consigned to the plaintiffs' own agent. By the bill of lading, the coal was to be delivered to Addison Child, or his assigns. But the bill of lading expressed that it was to be delivered to Addison Child, for the New England Glass Company; and, when the bill of lading was received by the consignee, he indorsed it and offered it to the defendants' agent, which, it is said, was a substantial compliance with the alleged custom. The supposed custom required the coal to be consigned to the defendants, but it was, in fact, consigned to the plaintiffs' agent. This, so far from being a substantial compliance with, was the widest possible departure from, the custom.

The bill of lading gave the defendants no right to, or control over, the coal, and, when indorsed and offered to the defendants' agent, was promptly rejected.

There having, therefore, been no acceptance of the coal by the defendants to satisfy the statute of frauds, according to the provision of the report, the plaintiffs must become nonsuit.

Plaintiffs nonsuit.

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ROBERT HOOPER, Executor *vs.* HENRY HOOPER & others.

H, by will, gave his wife, for life, the use of his dwelling-house and of all his plate and furniture; also an annual income arising from an investment of \$40,000: and to W. R. H. and F. H. H., grandsons, \$1,000 each, to be paid when they should be twenty-one years of age; but if they, or either, should not live so long, the bequest to them to belong to the testator's children; to S. H. and B. F. H., and seven other children, each one ninth of his estate, real and personal. He then directed that the said \$40,000 should remain invested thirty years after his wife's decease, the income to be equally divided among his nine children, or their heirs; and that, after the decease of his wife, all his real estate should be sold. After the decease of the widow, the executor sold the real estate and furniture, and filed a bill in equity, for direction in the construction of the will; held, that the clause directing that the investment of the \$40,000 should remain for thirty years after the wife's decease, was void; that the gift of the testator's "estate, real and personal," one ninth to each of his children, embraced the reversion expectant on the determination of the widow's life estate in the \$40,000, and also the proceeds of the real estate sold by the executor.

S. H. one of the sons, died after his father, the testator, but in the lifetime of the widow, intestate and without issue; his ninth was decreed to be paid to his personal representative.

B. F. H., one son, died before the testator, without issue and intestate; held, that his legacy of one ninth lapsed and fell into the general estate, and should be distributed as intestate estate, and that the two grandsons would take the share of their deceased father therein by right of representation.

F. H. H., one of the grandsons, died intestate and without issue after the testator's death; his portion of his deceased father's share was directed to be paid to his personal representative to be administered according to law.

THIS was a bill in equity, brought by Robert Hooper, executor and trustee under the will of his father, Robert Hooper, of Marblehead, deceased, for the purpose of obtaining the direction of this court, in regard to the true construction of the will, and his duties under it. All the devisees, legatees, and heirs at law, of the testator, were made parties to the suit, and the bill was taken for confessed against all of them except William R. Hooper, a grandson of the testator, who filed his answer.

From the bill and answer it appeared, that Robert Hooper, the testator, in and by his last will and testament, dated the twenty-second day of February, 1838, and duly proved on the fourth day of July, 1843, made certain bequests and provisions, the material portions of which were as follows:—

"First. I give to my beloved wife, Mary, during her life,

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the use and occupancy of my dwelling-house, &c., with all the plate, furniture, &c.

"Second. I give to my said wife an annual income, during her life, of two thousand dollars; and my executor is enjoined to invest in some certain and productive stock, from my personal estate, a sum sufficient for that purpose, the amount so invested to be not less than forty thousand dollars.

"Third. I give to my two grandsons, Franklin H. and William R., children of my late son William, deceased, each one thousand dollars, to be paid to them by my executor, when they shall be of the age of twenty-one years, should they live to that age, or either of them; but if they, or either of them, should not live so long, the said bequest or bequests shall belong to my children.

"Fourth. I give to my sons, Robert, John, and Henry, each one ninth part of my estate, real and personal, after providing for the bequest to my wife and to my two grandsons before named.

"Fifth. I give to my three daughters, each one ninth part of my estate, both real and personal, after providing for the bequest to my said wife and two grandsons before named, the children of my late son William, deceased. This bequest to each of my three daughters to be held in trust by my executor, &c.

"Sixth. I give to my sons, Nathaniel, Samuel, and Benjamin Franklin, each one ninth part of my estate, both real and personal, after providing for the bequest to my wife and two grandsons, children of my son William, deceased; this bequest to my said three sons to be held in trust by my executor, &c.

"Seventh. After the decease of my said wife, Mary, the said sum before mentioned, of not less than forty thousand dollars, or whatever amount may be invested by my executor in trust to produce the annual income of two thousand dollars, for the support of my said wife, the said sum so invested shall remain, during thirty years from her decease, the income of which shall be equally divided by my executor, among my before named nine children, or their heirs.

"Eighth. My executor is hereby authorized to sell all my real estate, including the dwelling-house given my wife, after her decease, when he may think best to do so."

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It further appeared that the complainant was appointed, by the will, the sole executor thereof, and took upon himself the trust; that the testator died on or about the second day of June, 1843, without altering or revoking his will, leaving his widow, five sons, three daughters, and two grandsons, Franklin H. and William R. Hooper, above named, these being the only heirs at law of the testator; that Benjamin F., one of the sons of the testator, died, intestate and without issue, in the lifetime of his father; that Samuel, another son of the testator, survived his father, but died, intestate and without issue, in the lifetime of the widow; that Franklin H. Hooper, one of the grandsons above named, had also deceased; that the widow died on the fourteenth day of April, 1850; and that, after her death, the complainant, as executor, sold the real estate, plate, and furniture of the testator.

The bill alleges inconsistent and conflicting claims by the parties entitled to the testator's estate, and prays the direction of the court in the distribution or other disposition of the trust fund of forty thousand dollars, and the proceeds of the sale of the dwelling-house, furniture, and plate.

William R. Hooper, by his answer, claims, as the sole representative of his father William, deceased, to be allowed a full share in and of so much of the property and estate of the testator, as by the complainant's bill it appears he has not divided among the heirs or legatees of the testator; to wit, one full eighth part of all the remainder of the estate; alleging that the reversion of the life estate of the widow in the sum of not less than forty thousand dollars, and in the real estate, plate, and furniture, had not been devised or bequeathed by the testator, but was left to be divided, in due course of law, as intestate estate, among the testator's legal heirs and representatives; and that the seventh clause in the will above recited was inoperative and void.

C. P. Curtis, for the complainant.

1. The limitation of the trust for thirty years after the decease of the widow is void. *Jarman on Wills*, c. 9, § 2; *Roper on Legacies*, c. 24, § 1.

2. Where the residuary legatee is general legatee, he is

entitled to what remains after satisfying the debts and legacies, including what may, by lapse, or invalid disposition, or other casualty, fall into the residue. *Cambridge v. Rous*, 8 Ves. 12; *Hayden v. Stoughton*, 5 Pick. 528, 537, and numerous cases cited by the counsel for the demandants; *Prescott v. Prescott*, 7 Met. 145; *Brown v. Higgs*, 4 Ves. 708; *Leake v. Robinson*, 2 Meriv. 363, 392, 393.

3. If the testator circumscribes and confines the residue, then the residuary legatee, instead of being a general legatee, becomes a specific legatee. *Attorney-General v. Johnstone*, Ambler, 577; *Easum v. Appleford*, 5 Mylne & Craig, 56.

4. Very special language is necessary to reduce a general residuary bequest to a special residuary bequest. *Bland v. Lamb*, 2 Jac. & Walker, 399, 406.

5. Where a residue is given, every presumption is to be made that the testator did not intend to die intestate, as to any of his estate. *Phillips v. Chamberlayne*, 4 Ves. 51; *Cushing v. Aylwin*, 12 Met. 169, 175.

6. It is not necessary that the testator should use the word *residue*, &c.; any words indicating that what was left, after paying or satisfying the debts and specific legacies, should go in a particular direction, are sufficient to carry a residue. *Bland v. Lamb*, 5 Mad. 412; S. C. on appeal, 2 Jac. & Walk. 399; *Legge v. Asgin*, 1 Turn. & Russ. 265, n; *Boys v. Morgan*, 9 Sim. 289; S. C. on appeal, 3 Myl. & Craig, 661; *Kellogg v. Blair*, 6 Met. 322.

7. Where the testator directs his executor to sell his real estate, it becomes personal estate, and goes with the residue of the personalty. *Durour v. Motteux*, 1 Ves. Sen. 320; *Kennell v. Abbott*, 4 Ves. 802; *Fleming v. Burrows*, 1 Russ. 276; *Leighton v. Bailie*, 3 Myl. & Keen, 267; *Clowes v. Clowes*, 9 Sim. 403; *Green v. Jackson*, 2 Russ. & Myl. 238.

8. The words, "one ninth part of my estate, both real and personal," constitute each legatee a general legatee of that aliquot part of the testator's whole estate. *Briggs v. Hosford*, 22 Pick. 288; *Kellogg v. Blair*, 6 Met. 322.

9. General legacies are favored by the court, rather than specific ones. *Briggs v. Hosford*, 22 Pick. 288.

10. If a devise of land is void, because the devisee is incapable of taking, the land goes to one to whom the testator has given all the residue of his estate, or all his estate undisposed of. *Hayden v. Stoughton*, 5 Pick. 528, 536.

11. Since the alteration of the laws respecting after purchased real estate, real estate not specifically disposed of, or the devise of which should fail, would go to the residuary legatee, and not to the heir at law. *Prescott v. Prescott*, 7 Met. 141, 146 ; 2 Roper on Legacies, c. 24, § 1, under nearly all the above points.

J. M. Bell, (with whom was *R. Choate*,) for W. R. Hooper.

1. The limitation in trust, under the seventh clause of the will, is void, as tending to create a perpetuity ; and, therefore, the sum thus devised in trust fell in, upon the death of Mrs. Hooper, to go to the general heirs of the testator's estate, unless otherwise disposed of by the will. 1 Jarman on Wills, c. 9, § 2.

2. The property bequeathed under the first clause of the will fell in, at the death of Mrs. Hooper, to go to the general heirs of the testator, unless otherwise disposed of by the will, since she had but a life estate.

3. The will contains no clause or words sufficient to carry a residue to any person named in it, and, therefore, this property goes to the general heirs. No case is found, in which a phrase clearly indicating the residue is not contained, making mistake impossible. "Any thing that I have forgot," *Bland v. Lamb*, 5 Mad. 412 ; "In case there shall be any money remaining," *Legge v. Asgin*, 1 Turn. & Russ. 265, n ; "And keep the residue," *Boys v. Morgan*, 9 Sim. 289, 290 ; "Not disposed of as above," *Kellogg v. Blair*, 6 Met. 322.

4. The testator did not intend the devise to the nine devisees as a residuary devise, otherwise he would not have subsequently made the disposition in trust of the forty thousand dollars, which he did in the seventh clause.

SHAW, C. J. Robert Hooper, of Boston, the complainant, executor and trustee under the will of his father, Robert Hooper, late of Marblehead, brings his bill, setting forth the will and the trusts under it, and setting forth the conflicting

claims of several of the legatees and heirs at law, for the purpose of obtaining the direction of this court, under its equity jurisdiction, in regard to the true construction and legal effect and operation of the will, and in regard to the right performance of his duties under it, in the execution and performance of the trusts. All the devisees, legatees, and heirs at law of the said Robert Hooper, deceased, were made parties to the suit. By an order, heretofore entered in this suit, the bill is ordered to be taken for confessed against all the respondents, except against William R. Hooper, a grandson of the deceased testator, who has made his answer.

No question arises as to the jurisdiction; it is the plain case of trusts arising under a will, and therefore within the equity jurisdiction of the court, by the terms of Rev. Sts. c. 81, § 8.

The great question arising in the case is, whether, by his will, the testator disposed of the whole of his real and personal estate. It is contended, on the part of the respondent, William R. Hooper, that, in regard to the \$40,000 fund, to be created by the executor, and held by him during the life of the wife of the testator, and also the dwelling-house and furniture devised to her for life, with authority to the executor to sell the same, no disposition is made of the reversion expectant on the determination of her life, that it remained, therefore, to pass by inheritance, as intestate estate, and that, by right of representation of his deceased father, he was entitled to his share of it.

It may be proper, first, to consider that provision in the seventh item of the will, which directs the executor, in regard to the \$40,000 set apart and invested, to raise an income for the wife during her life, which is, that, after the death of his wife, the said sum, so invested, shall remain during thirty years from her decease, "the income of which shall be equally divided by my executor, or his successors, on receipt thereof, amongst my before named nine children, or their heirs."

It is admitted and claimed by both parties, that this clause in the will cannot be held valid, and we are clearly of that opinion. It tends to keep the estate open and unsettled for a

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longer time than is allowed by the rules of law; and it is contrary to the rules of law in regard to perpetuities. That clause in the will, therefore, is to be treated as inoperative and void, and as if it had not been inserted; and the estate is to be distributable immediately from and after the decease of the widow.

The testator having given his widow the dwelling-house and furniture for life, with power to the executor to sell both the house and furniture, and the executor having, after her decease, executed that power, the proceeds stand upon the same footing as the estate itself; and, as the will affected both the real and personal estate, whether the real estate would have passed by devise or descent, the proceeds will pass in the same manner. No distinction, therefore, need be made between the two sums, the \$40,000 fund, and the proceeds of the real estate and furniture; if the will be such as to dispose of the one, it will in like manner dispose of the other. On the contrary, if the one descended, as intestate, to the heirs at law, the other would descend, and to the same persons.

This brings us to the main subject of controversy. If the testamentary gifts by the testator to his six sons and three daughters amounted to a general disposition of his estate, including the reversion expectant upon the termination of the widow's life estate, it passed by the devises to them, and left nothing to descend as intestate property. This depends on the terms and right construction of the will.

In the fourth clause, he says, "I give to my sons, Robert, John, & Henry, each one ninth part of my estate, real and personal, after providing for the bequest to my wife and to my two grandsons before named." The word "after" used in such a connection, is often and properly construed to mean "subject to," "after taking out, deducting, or appropriating." It is this which gives meaning and significance to the words "net," "residue," "remainder," and "residuary," so familiar in testamentary dispositions. The fund, the subject matter from which something was to be taken or deducted, was "my estate, real and personal." The term "estate" is regarded as

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of very large import, and, unless limited by some epithet, or some association, is construed to mean all the party's property; but, when the words "real" and "personal" are added, it seems to put the matter beyond cavil. Then, what is to be deducted or excepted out of this general mass of property? Two specific money legacies to grandsons, subject to a condition, and a life estate in a house and furniture, and the income of a fund not less than \$40,000 to the wife. This gift of a life estate clearly left a reversion; and this appropriation of the income of a capital fund left the fund itself undisposed of. But both the reversion and the capital fund were part of the testator's estate, and, not being within the part excepted or taken out, passed by the devise. A reversion may pass under the term estate, if not restrained or qualified. Then, let us look at the first branch of the above bequest. I give to my son Robert one ninth part of my estate, real, &c., after, &c. The word "give" is of the largest signification, and is applicable as well to real as personal estate. It is, then, a testamentary gift of one ninth of his whole property, deducting and excepting therefrom only the life estate and the income of the capital fund; the reversion, that is, the estate itself, subject to an intervening right for life, and the capital fund, after the decease of the wife, were not within the exception, therefore, they were included in the gift. The two ninths to John and Henry were of the same effect. Three other ninths are given away from the testator and his heirs, to the three daughters, only they are placed in trust; and three other ninths to his three other sons, likewise placed in trust. Thus, by the fourth, fifth, and sixth clauses of the will, the entire nine ninths, or whole estate, are disposed of by the will. The whole estate is given, subject to certain precise and specific exceptions; these have been deducted and appropriated; so that the whole remaining estate comes under the operation of the will, and, therefore, there is nothing to pass by descent, as undevised.

Some other points, embraced in the argument, require consideration.

It appears, by the facts, that Benjamin F. Hooper, one of

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the sons, died in the lifetime of the testator, intestate and without issue. This legacy, therefore, lapsed and failed to take effect. As the residuary property, including the \$40,000 capital fund, the proceeds of the dwelling-house and furniture, and the reversion therein, were not given to the sons and daughters as a class, or to take share and share alike, but one part was specifically given to each son and daughter, the legacy of Benjamin F., which thus lapsed and fell into the general estate, did not vest in the survivors; but, by a gift of one ninth to each of the eight children who survived, each could claim only his aliquot part, and, therefore, one ninth of the testator's general estate remained undisposed of by the will, and, therefore, must descend and be distributed, as the intestate estate of the testator. In this distribution, the two grandsons, William R. Hooper and Franklin H. Hooper, both living at the decease of the testator, by right of representation of their deceased father, William Hooper, would take together one share, equal to that of the eight surviving sons and daughters, giving them together one ninth, or one moiety of one ninth each. As this was personal property, and Franklin H. had deceased, when the right to distribution and payment accrued, his share will properly go into the hands of his personal representative, to be disposed of in a due course of administration. The surviving brother, William R., may ultimately be entitled to the share of the deceased, as heir and distributee; but the estate will be first liable for the payment of the debts of Franklin H., if he left any, and other charges on his estate; and in such case, William R. would claim, by force of the statute of distributions, as heir of his brother. But William R. will be entitled to the other moiety of this ninth in his own right.

As to the share of Samuel Hooper, one of the sons, it appears, by the facts, that he survived his father, but died in the lifetime of the widow. One ninth vested in him, and, being personal property, it must go to his personal representative, to be administered. It being found that he died intestate and without issue, his one ninth, after due administration, and subject to debts and charges on his estate, if any, will go

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to his heirs at law, under a decree of distribution. In such distribution, William R., if he alone survived his uncle Samuel, or he and Franklin H. together, as tenants in common, if both survive, would be entitled to one share, equally with the surviving brothers and sisters of Samuel, under the rule of descent in this commonwealth, extending the inheritance, by right of representation, to brothers' and sisters' children. But this is not the subject for any decree in the present case, because it is the duty of the complainant, as executor and trustee, to pay this share to the personal representative of Samuel Hooper, deceased, without regarding any ulterior disposition of the fund. *Decree accordingly.*

URIEL CROCKER & others, Trustees, vs. LEMUEL GILBERT.
SAME vs. SAME.

Where a promissory note is made payable in three years from date, and, after the expiration of that time, a party covenants that the note shall be paid "according to its tenor," the contract must be understood with reference to a note overdue, and the guaranty is equivalent to a stipulation for payment of a note payable on demand.

The promisor, in a note, secured by mortgage of real estate, sold the equity of redemption, and, after the note became due, the purchaser guaranteed its payment under seal. The mortgagee subsequently took possession of the land for condition broken; and, in an action on the guaranty, it was held, that the guarantor might be called upon at once to pay the same, and the mortgagee was not bound to first apply the mortgage security.

An objection that a declaration is defective should be taken either by a demurrer or a motion in arrest of judgment, and the point is not properly raised on the trial to the jury of the issues of fact.

In an action on a guaranty indorsed on a promissory note, "that the within note shall be paid," the declaration alleged, that "the said A. (the guarantor) has not paid said note and interest, but wholly neglects and refuses," &c., instead of averring that "the note had not been paid." This defect, was held to be cured by a verdict, and to be no ground for an arrest of judgment.

An objection to the declaration, that it failed to allege notice to the defendant of the non-payment of the note, even if such notice was necessary, comes too late after verdict.

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THESE were actions of covenant. John H. Braynard, on the 1st day of January, 1844, executed two promissory notes, by each of which he promised to pay to William J. Walker or order, the sum of thirty-seven hundred dollars, in three years from date, with interest semiannually, at the rate of six per cent. On the 1st of July, 1847, the notes being overdue, and indorsed in blank by William J. Walker, the defendant indorsed them, under his hand and seal as follows: "I hereby promise Uriel Crocker, Thomas Marshall, and John B. Walker, trustees, that the within note shall be paid, principal and interest, according to its tenor." The actions were on this guaranty, and the assignments of breaches were as follows:—

"Yet the said Gilbert, though often requested, said note and said interest has not paid, but wholly neglects and refuses so to do. And so the said defendant, his said covenant hath not kept, but hath broken the same."

"And the said Walker had indorsed the said note to the plaintiffs, long before said covenant; yet the said Gilbert, though often requested, hath not paid the said note, nor the interest thereof, but wholly neglects and refuses so to do. And so the said defendant, his said covenant hath not kept, but hath broken the same."

The trial was in this court before *Bigelow*, J., who reported the cases to the full court.

At the trial, the plaintiffs offered in evidence the two promissory notes, with the writing indorsed thereon, signed and sealed by the defendant.

The defendant objected to the sufficiency of the declarations, on the ground that a breach of the covenant relied on was not properly alleged, but the judge overruled the objection.

It was proved or admitted, that the two notes were, at their inception, secured by the promisor, by a conveyance in mortgage of certain real estate; that the defendant purchased the right in equity to redeem the mortgaged real estate in December, 1845, after which he executed the agreement on the back of the notes; that the plaintiffs, after the execution of the

agreement, and before the commencement of these actions, took possession of the mortgaged real estate for condition broken, and, since then, had been in possession of the rents and profits thereof; and that three years had not expired since possession was taken.

The plaintiffs offered no other evidence, and thereupon the defendant moved for a nonsuit. This motion was not granted, the judge being of the opinion that the plaintiffs were entitled to recover the amount of the notes and interest, less the sums received for rents and profits of the mortgaged premises. It was, thereupon, agreed by the parties, that a verdict should be taken for the full amount of the notes and interest, subject to the opinion of the whole court.

And if, on the foregoing facts, the whole court shall be of the opinion, that the plaintiffs are entitled to recover, they are to remit so much of the verdict as shall be equal to the sums received by them for the rents and profits of the mortgaged premises, up to the time of the rendition of judgment, and judgment is to be rendered for the balance. If the court shall be of the opinion that the plaintiffs are not entitled to recover, a nonsuit is to be entered, or such other disposition is to be made of the case as the court shall think proper.

A. W. Austin, for the plaintiffs.

E. F. Hodges, for the defendant, cited *Platt on Covenants* 569; *Shep. Touch.* 164; *Dorsling v. Mill*, 1 Maddock, 541; *Buckmaster v. Grundy*, 1 Scammon, 310; *Vanderkemp v. Skelton*, 11 Paige, 28; *Grannis v. Miller*, 1 Ala. 471; *Tredwell v. Steele*, 3 Caines, 169; *Newton v. Wilmot*, 8 Mee. & W. 711; *McDonald v. Hobson*, 7 How. 745; *Newell v. Roberts*, 13 Conn. 417; *Frazer v. Skey*, 2 Chit. 646; *Mitchell v. Dall*, 2 Har. & Gill, 159; *Griffin v. Fairbrother*, 1 Fairf. 91; *Jackson v. Hanson*, 8 Mee. & W. 477.

DEWEY, J. 1. It is objected to maintaining this action, that the covenant was one not possible to be performed, and so no action lies for the breach of it. But we think this view of the case is fundamentally erroneous. It is true that, taking the promise of the defendants literally, the note was to be paid according to its tenor, and, the time specified in the note for

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payment having already past, when the covenant was entered into, the note could not be paid at the day stipulated in the note. But the contract is to be construed with reference to the state of things then known to the parties as existing, and, it being thus known to them, that the day of payment of the note had already passed, the parties must be understood to be contracting in reference to a note overdue, and the guaranty was equivalent to a stipulation for payment of a note payable on demand.

2. The contract being under seal, no further proof of consideration was required. Contracts under seal avail by their solemnity, and sufficient evidence of consideration is thereby shown. If any further consideration was requisite, we apprehend the relation of these parties, as to their interest in the premises held by the plaintiff as mortgagee, and by the guarantor as the owner of the equity of redemption, and thereby to be benefited by the delay in foreclosing the mortgage, might be held to raise a sufficient consideration for the promise of the defendant. *Adams v. Bean*, 12 Mass. 138.

3. This covenant is not one, the performance of which was to be postponed until the mortgage security had been made available, and the proceeds applied to the note, leaving the guarantor liable only for the deficiency. On the other hand, he might at once be called upon to pay the same, leaving him the full benefit of the security in the land, so far as the same was not enforced by the mortgagee.

4. It is then said that the breach of the covenant is not well alleged in the declaration. This point is not properly raised on the trial, to the jury, of the issues of fact. If the declaration is defective the defendant should take the objection either by a demurrer or a motion in arrest of judgment. The question being stated in the report, we have, however, considered it, and, treating it as a motion in arrest of judgment, are of opinion that it cannot prevail. It is true that the breach is not assigned in the most apt words, alleging, as it does, that "the said Gilbert has not paid said note and interest, but wholly neglects and refuses," &c., instead of averring "that the note had not been paid." But, after verdict, this defect is

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cured, inasmuch as the plaintiff, to have maintained his action upon this covenant, would necessarily have been required to show the note unpaid. The first step would be to show the debt as still undischarged, and, if not paid, it would meet the broader issue, which should have been presented on a proper assignment of the breach of the covenant.

5. A further point was taken at the argument, though not raised in the report of the case, as to the want of an allegation of notice to the defendant of non-payment of the note. Whether such notice is necessary at all when the guaranty is for the payment of a certain sum, and absolute at all events, it is not necessary now to consider. After verdict the objection comes too late. If the declaration was defective, in not alleging notice to the defendant, the defect is cured by the verdict. *Colt v. Root*, 17 Mass. 229. In the present case, however, this objection is not properly before us in any form.

Judgment on the verdict for the plaintiffs.

WILLIAM C. HOLMES vs. ISAAC S. DOANE.
THE SAME vs. THE SAME.

A. agreed to carry B. in his vessel to California, if B., who was a carpenter, would do what work was necessary in preparing her for sea, and during the voyage. Before the vessel was ready for sea, A. refused to carry B., except on condition of his paying \$25 and signing the shipping papers. B. signed the papers, and, at the same time, gave the shipping master a note for \$25. On the day the vessel sailed, A. turned B. out of his vessel, giving as a reason the non-payment of the \$25. B. brought an action for a breach of contract, and it was held, that A. might show that the original parol agreement was, subsequently and before the sailing of the vessel, modified by further stipulations entered into between the parties, and that such modified agreement needed no new consideration to make it the basis of future liabilities between the parties; that it was a question for the jury whether the shipping agent had authority to take the note of B. for \$25, as cash, and so, whether the modified agreement had been fully performed by B.

When the instruction to the jury is such that the ground upon which the verdict was rendered cannot be ascertained, it must be set aside.

THE first of these actions was for an alleged breach of contract in not giving the plaintiff a passage to California in the defendant's brig *Globe*. It was tried in the court of common pleas, before *Wells*, C. J., who signed the following bill of exceptions.

The plaintiff produced evidence tending to show (though the defendant denied the fact) a contract to ship the plaintiff to San Francisco, for his services as carpenter, in preparing the vessel for sea, and doing the work on her during the voyage, without requiring him to pay any thing; and that the plaintiff then went to work on the vessel, and continued so at work about fourteen days. It also appeared, by the plaintiff's own witness, on cross-examination by the defendant, that he had signed the shipping papers, subsequent to the making of the above contract.

Thereupon the defendant objected to any verbal evidence respecting the terms of the contract, but the judge overruled the objection.

The defendant produced evidence tending to show that, at a subsequent time, he instructed the shipping master not to let the plaintiff sign without first paying twenty-five dollars, and that the plaintiff was, repeatedly, on several different days, informed of this by him, and made no objection or complaint, but promised to procure the twenty-five dollars, and in fact did, at the time of signing, give the master a note for that amount. Whether the master was authorized to receive the note, was a subject of controversy between the parties.

On the day the vessel sailed, the defendant turned the plaintiff out of the vessel, giving as a reason the non-payment of the \$25, the plaintiff objecting and refusing to go, and claiming a right to take passage in the vessel.

There was testimony that the shipping papers, before the plaintiff's signature, contained an agreement to give the plaintiff twenty-five cents wages per month; and there was no testimony that the contract, if any, to ship him without requiring any money payment from him, contained any such stipulation.

The defendant contended to the jury, that the subsequent

agreement was a waiver and abandonment of the former one.

On this point the judge ruled and instructed the jury that, if the defendant originally contracted to ship the plaintiff without requiring him to pay any money, and the plaintiff had commenced work under such contract, and the defendant, afterwards, without any new consideration, imposed upon the plaintiff, as the condition of being permitted to take passage in the vessel, that he would, in addition to the original agreement, pay the sum of twenty-five dollars before shipping; and thereupon the plaintiff promised to pay such sum, such additional agreement would be without consideration, and not binding upon the plaintiff, and would leave him with the right of enforcing the original agreement.

On the subject of damages, there was evidence that the plaintiff had spent time and money in fitting himself out for the expedition, and what would have been the cost of a passage out in some other vessel as a passenger, and what he would have had to pay for a passage, if he would agree to work as he had agreed with the defendant.

The judge ruled that the general rule of damages was to allow the plaintiff what would have put him in as good a condition as if he had gone as agreed; but not to reckon in this account his prospects in California.

There was no objection made to the charge as not being sufficiently specific.

The judge refused to rule that, if the plaintiff, by the original contract was to pay nothing, but afterwards, on the refusal otherwise to ship him, he agreed to pay the twenty-five dollars, but failed so to do, and such failure was the only reason for refusing a passage, the measure of the damages would be the twenty-five dollars.

The jury returned a verdict for the plaintiff. To which rulings and omissions to rule, the defendant excepted.

The second was an action of trespass, for carrying part of the plaintiff's baggage to California, in the defendant's vessel, and was tried in the court of common pleas with the preceding case.

It came into this court on the following bill of exceptions:—

On the day the vessel sailed, the defendant ordered the plaintiff out of the vessel, and his chest of tools to be put on shore. That and some of the rest of his baggage was put on shore, but the rest was carried away.

It was not contended by the defendant but that he was liable in this action, provided the preceding action was sustained, unless the judge should be of opinion that the damages claimed in this suit could not be the subject of a distinct action. The judge ruled that, if the defendant had not a right to turn the plaintiff out of his vessel, the defendant was liable in this action; but if he had, his liability depended on whether he gave the plaintiff reasonable time to get his baggage out of the vessel, after turning him out and before sailing; that, if liable, the measure of damages would be the cost of an outfit such as was carried away, unless the defendant was actuated by malice, in which case more might be given.

The defendant contended that the transaction of refusing to convey the plaintiff, and then afterwards carrying off his goods, was one transaction for which the plaintiff was entitled to full damages in the first action, and none in this; but the judge ruled that a separate action might be maintained for carrying away the baggage.

To the foregoing rulings the defendant excepted.

T. Willey, for the plaintiff.

R. Choute and *G. Minot*, for the defendant.

DEWEY, J. 1. It was competent for the defendant to show that the parol agreement, made with the agent of the defendant, by the plaintiff, containing certain stipulations to be performed by the respective parties, in reference to the carrying the plaintiff to California, was, subsequently, and before the sailing of the vessel, modified by some further stipulations, entered into between the parties, and such modified agreement forms the basis of their future obligations as to the subject of the contract. Thus, the defendant might show that, at a period prior to the sailing of the vessel, he gave notice to the plaintiff that he would not comply with his

original agreement, and would hold himself responsible for all damages by reason of such breach of contract; and that the plaintiff, thereupon, elected not to avail himself of his right to recover damages therefor, but chose to make a new contract, giving the defendant more advantageous terms, and in consequence of which the defendant would agree to carry the plaintiff to California, and such new contract would be a valid contract between the parties. Nor is any new consideration, further than what exists, on the case supposed, necessary to give effect to this agreement, and make it the basis of future liability between the parties.

This principle is fully recognized in the cases of *Munroe v. Perkins*, 9 Pick. 298; *Lattimore v. Harsen*, 14 Johns. 330; *Blood v. Enos*, 12 Vermont, 625.

2. The shipping paper put into the case, leaves the matter of the payment of the \$25, too uncertain as to the party by whom it was to be paid, to give it the effect it might otherwise have, in excluding the parol evidence introduced by the plaintiff, as to the original parol agreement. The parol evidence of the plaintiff, if admissible at all, however, is, of course, liable to be controlled by other parol evidence of a modification of that agreement.

3. The question of the authority of the shipping agent to take the note of the plaintiff for \$25, as cash, is a point yet open, and is to be left to the jury, under proper instructions. If received as payment, and under authority from the principal, the jury may find the modified agreement to have been fully performed on the part of the plaintiff; but, if it was a mere memorandum, or due-bill, with the understanding of all parties, that the same was to be paid in cash, before the party would be entitled to be carried to California, then the giving the note was not a payment of the \$25; and if the evidence so establishes the fact, it may be so treated, assuming that the note has never been paid to the defendant, or negotiated by him.

Verdict set aside and a new trial ordered.

DEWEY, J. The second action was tried in connection with the other, under instructions from the court, one branch

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of which depended upon the questions raised and settled in the preceding case, that is, as to the right of the defendant to turn the plaintiff out of his vessel, by reason of his failure to pay the \$25 already referred to. It being uncertain upon what ground the verdict for the plaintiff was found by the jury, the same must be set aside, and a new trial had.

New trial ordered

**THE NEW ENGLAND MUTUAL FIRE INSURANCE COMPANY vs.
CHARLES W. BELKNAP & another.**

In an action by a mutual insurance company against one of its members, for an assessment made on a deposit note, where the note itself recites the receiving of a policy, such recital is *prima facie* evidence that a policy has been issued; and it is no ground for a new trial, that only an abstract of the policy was introduced in evidence by the company.

The promisor in a deposit note, given to a mutual insurance company at the time of taking out a policy, is estopped from setting up, in an action for an assessment made on the note, the want of an insurable interest in the property.

An assessment may be made by a mutual insurance company on the whole amount of a deposit note, although the promisor has an insurable interest in a part only of the property covered by the policy.

A mutual insurance company need not proceed, after every loss happening to it, to compute the assessments on its deposit notes requisite to meet such loss, but may adopt a rule of proceeding that will approximate as near as is practicable and reasonable to the above method.

THIS was an action of assumpsit, and was tried in the court of common pleas before Hoar, J., who signed a bill of exceptions substantially as follows.

The action was upon a note signed by the defendants, of which the following is a copy:—

“For value received in policy No. 2458, dated the 14th day of November, 1846, issued by the New England Mutual Fire Insurance Company, we promise to pay the said company, or their treasurer for the time being, the sum of one hundred and ninety-six dollars, in such portions and at such time or times as the directors of said company may, agreeably to the act of incorporation and by-laws require.”

The plaintiffs claimed to recover of the defendants the

amount of two assessments, which they alleged to have been made upon the note, by their directors, agreeably to their act of incorporation and by-laws; one of them for \$31.36, made July 15, 1849, and the other for \$19.60, made November 14, 1849.

The defendants pleaded the general issue, and contended that they were not owners of the property purporting to be insured by the policy of insurance, and had no title, legal or equitable, in and to the same, at the time they made the application and obtained the policy of insurance mentioned in the plaintiffs' declaration, and that, therefore, the policy was void, and the note was void and without consideration.

The plaintiffs put in evidence the note and the application for insurance, signed by the defendants, the signatures of which were admitted; also the act of incorporation and by-laws of the company, and the record of the abstract of the policy issued by the plaintiffs to the defendants. The defendants objected to the admission of this abstract, but the objection was overruled.

The plaintiffs then introduced William C. Prescott, who claimed to be, and to have been from June 21, 1849, the clerk of the company, and who produced the book of records of the acts of the directors, and read from it what purported to be a record of the doings of the directors at a meeting held June 21, 1849, at which meeting it appeared from the record that Prescott was chosen clerk, and which record appeared to be signed by John Whipple, as clerk *pro tem*. The witness testified that the record and signatures were in the handwriting of John Whipple, who was still alive; that, on the same day, he was called into the room by the directors, and informed of his election, and that he was then sworn in as clerk, under the provisions of a general law of New Hampshire; that he believed his oath was verbal only; that no record was made of such oath; that the book now produced was put into his hands by the directors, as the directors' book of records; and that, from that time to the time of the trial, he had continued to act as clerk of the company, and to record the doings of the directors in such book; that, as to the book

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being the record of the directors before that time, he had no personal knowledge.

The defendants objected to the admission of the record and the testimony of the witness, but the judge admitted both.

The plaintiffs then offered in evidence the record of a meeting of the directors, dated July 9, 1849, and of their doings at that meeting, signed by Prescott, as clerk, and recorded by Prescott, as clerk, in the book last referred to; among which doings was a vote to levy an assessment of \$48,000 on the premium notes of the company, to defray losses and expenses from the 14th of November, 1848. Prescott testified that he was present at that meeting, and recorded the vote; that, after the vote was passed, the treasurer proceeded to calculate the amount of the assessment upon the several premium notes which were in force during a part or all the time covered by the assessment; that, in this calculation, he assisted the treasurer; that the calculation was made by taking the loss book and the book of policies, and ascertaining what was the amount of premium notes outstanding at the date of the first loss accruing since the date of the former assessment, ascertaining what would be the percentage to meet the loss on the notes then in force; that this calculation was repeated as often as the losses amounted to one half of one per cent upon the premium notes in force at the time of the loss, dropping and leaving out such notes as had expired since the last preceding loss, and taking in such notes as had been given since such preceding loss; and that in this way the percentage upon the different notes was made up; that he did not himself verify the treasurer's calculation, or go over the calculation, so as to state from his own knowledge that it was correct; that the treasurer entered the amount of the assessment against each note in a book which he kept for that purpose, which contained the names of parties insured, arranged by towns, the amount of each note, and the sum assessed upon it; that he did not consider that the book was one of the records of the company, nor kept by him as clerk, but was the treasurer's private memorandum book; that it

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was kept in a safe, with the other books, and that there was no other record on the books of the company of the amount assessed on each note.

The witness then produced a printed table of the rates of assessment upon the different premium notes of the company, which he testified he took from the files of the company, and which was an exact printed copy of the table of rates so made up by the treasurer; that he knew it to be a printed copy of the original manuscript sent to the printer by the treasurer, and precisely like it; that a large number of them was printed for distribution among their members; that it was seen and recognized by the directors as the table of the rates of assessment, and sent out by them as such to the members of the company; that it was the table of rates by which they demanded and collected the assessments, and that, to his knowledge, no objection had ever been made to its correctness; and that the greater part of the assessments based upon it had been paid. It appeared by the table, that the rate of the defendants was sixteen per cent.

The witness also testified, that he had made no search for the manuscript at the printers; and that the loss book above mentioned was merely his own memorandum of losses, as information was received of them, and was not kept as a record; that the company did not record verbatim copies of policies issued by them, and that the only record they kept of the policies issued by them was the one before referred to, which contained an abstract of the policies issued; and every thing which was in the policy, except the formal printed parts. No loss book and no book of policies, except the one containing such abstracts, was offered in evidence.

The defendants objected to the admission of the above testimony, table, and records, but the judge overruled the objection and admitted them.

No other evidence that assessments had been made by the company on the note in suit was offered by the plaintiffs. The plaintiffs proved notice to the defendants of this assessment, and demand of payment thereof before suit brought.

There being no evidence that the directors had ordered the

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last assessment claimed by the plaintiffs, they moved for leave to amend the declaration by striking out from it all relating to the second assessment; which motion, although the defendants objected, was allowed by the judge, after hearing what evidence the defendants proposed to introduce.

The defendants offered evidence tending to show, that, about the first of April, 1846, William White was the owner of all the property named in the defendants' application, and purporting to be insured by the policy, except the clothing and hay; that, at that time, he made a parol contract with the defendants, one of whom was his nephew, to sell them all of said property so owned by him, for the sum of \$7,000; that they were to go into possession of the property, and pay him therefor \$100 per month, until the whole of the purchase money was paid, or security given for it, when he was to give them a deed thereof; that they entered upon the possession, at that time, under such contract, and were in the possession at the time of effecting insurance, and had then made their payments regularly under the agreement; and that they still continued in possession until April, 1849, making their regular payments, but, at the time of effecting the insurance, White had given them no deed, bond, or other obligation in writing for such conveyance, nor did he, until April, 1849; when the defendant Grimes left the firm and relinquished all his interest in the property, and White resumed the possession of one half, and gave the defendant Belknap a conveyance of the other half of the real and personal estate.

The defendants claimed that they made their application for insurance under a mistake, and without any fraudulent intent. To prove the surrender of their policy, the defendants put in evidence a letter to them, signed "John Whipple, treasurer," saying to the defendants:—

"Your policy has been received, and will be discharged upon your paying what is due on your premium note for losses since November 15, 1848, to May 21, 1849, being fifteen per cent, making \$27.40, which, if remitted by mail, at my risk, before any more losses occur, your note will be returned

to you. No policies are discharged until all arrearages are paid."

On this evidence, the defendants contended that the plaintiffs could not recover either of the assessments of the defendants, because the defendants had no insurable interest in the property purporting to be insured, at the date of the policy, or, in case it should appear that they had an insurable interest in a part of the property, that there would be a short interest, and that the plaintiffs were therefore entitled to recover only a *pro rata* part of the assessment.

But the judge ruled that the evidence offered by the plaintiffs was competent for the consideration of the jury, on the point of the regularity of the assessment, according to the terms of the note, and that the defence would not be sustained, in whole or in part, by the evidence offered by the defendants, and a verdict was returned for \$32.42, the amount of the first assessment and interest from the date of the writ. The defendants excepted.

A. A. Ranney, for the defendants.

T. S. Harlow, for the plaintiffs.

DEWEY, J. The objection to the "abstract" of the policy introduced at the trial, furnishes no reason for a new trial. The promise in writing, upon which the suit is brought, recites the receiving of a policy, which was quite sufficient for the purpose of showing, *prima facie*, that a policy had been issued to the defendants.

It is then insisted, by the defendants, that, in fact, they were not the owners of the property insured, at the time of executing the policy; and so the policy did not take effect, and, therefore, no liability should attach to them to pay their note, or promise to pay such assessment, not exceeding \$196.00, "as the directors might, agreeably to their act of incorporation and by-laws, require."

In ordinary insurance in stock companies, this objection, if it existed, might entitle the party who had paid a premium, to receive back the same, as paid upon a consideration that

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had failed. But it by no means follows that this principle exists in reference to the promissory notes given by the members of a mutual fire insurance company, as deposit notes, and which form the capital, to a great extent, of these companies.

Here are mutual promises to contribute *pro rata* towards losses, limited only by the amount of the deposit note. It is upon the strength of these notes that insurances are authorized to be made. Upon these notes all assessments are to be made, *pro rata*, to meet losses. Herein is the great difference between these deposit notes and the payment of a premium to a stock company.

Again; upon the strength of these notes, the party becomes a member of the company, and acts as such at all meetings.

There may be, therefore, strong ground for taking a distinction between stock companies and mutual fire insurance companies, where the insured alone are members. Whether such deposit notes may not, under certain circumstances, be discharged as to future liability, it is not necessary to decide now. In some cases, as that of alienation, it is directly provided that it may cease, by surrendering the policy and paying all liabilities up to that time. So here, it may be that, upon a surrender of the policy, when the party found he had insured property not his own, and in which he had no insurable interest, and paid all assessments and liabilities, he might from that time be discharged.

But this would be the extent of his right to be discharged from future assessments.

The party thus standing in this relation to a mutual insurance company, is estopped from setting up the want of an insurable interest in a policy, by virtue of which he has become connected as a member of the company, and his deposit note has become a part of the capital of the company, upon the basis of which all assessments are required to be made.

In point of fact, here, the policy was not a void policy, inasmuch as certain articles, namely, the clothing and the hay, named in it, did belong to the assured; and this would pre-

sent a difficulty in the way of the defendants' treating the policy as a nullity, and their note as wholly without consideration. As to the other portion of the articles insured, the defendants themselves resort to the peculiar nature of this corporation, as a mutual one, to sustain their position, that, as to such articles, there was not a valid policy. A contract creates an interest, and articles agreeing to buy the property may, under some circumstances, be quite sufficient to create an insurable interest if insured in stock companies; but as a lien for the deposit note cannot attach, in a mutual office, such policy is held invalid, as respects the liability of the company.

A like reason, drawn from the peculiar character of this company, may strongly demand the application of the principle, that the payment of the deposit notes be enforced, although a note given for the premium in a stock company could not be.

It was objected that, in case of insurable interest for part only of the property, an assessment upon the whole note would be bad. But we think not so, before a surrender of the policy, and payment of all existing liabilities.

This brings us to the further objection, that the assessment was not made in proper form. As to the period of time for which the losses were assessed upon the defendants, the views already expressed, as to the continuing liability until a surrender of the policy, and payment of all past liabilities, fully meet that point.

But the further point is still open, as to the mode of making the assessment and the authority from whence it issued.

As to the authority, the statute provides that all assessments shall be determined by the directors, and it was so done here. As to the basis of the computation of losses, and the deposit notes liable to assessment, we think it was a reasonable one; and that, from the necessity of the case, these computations are not to be required to be made by assessments made upon each occasion of loss, but upon a rule that will approximate to it as near as is practicable and reasonable, and we think this did so.

We think no valid objection is shown as to the form of the

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assessment, and that the arrears of the assessment on the defendants is sufficiently shown by the papers introduced and the supplementary evidence, to justify the directions of the presiding judge, and authorizing the jury to find a verdict for the plaintiffs, for the assessment of \$31.86, made July 15, 1849.

Exceptions overruled, and judgment on the verdict.

KATHERINE MAGEE vs. ROBERT SCOTT.

Ownership of personal property once proved, is presumed to continue until an alienation is shown; merely parting with the possession is not conclusive evidence of a change of title.

Possession of personal property with the consent of the true owner, does not raise a legal presumption of title against such owner.

In trover, a demand and refusal is evidence of a conversion, conclusive if not rebutted, or explained.

THIS was an action of trover, to recover the value of certain articles of furniture. At the trial in the court of common pleas, there was evidence tending to show, that the articles were purchased by the plaintiff, and subsequently came into the possession of the defendant, by consent of the plaintiff, but upon what contract, bargain, or understanding, did not appear.

The conversion by the defendant, if any, consisted in his refusing to deliver the property upon the demand of the plaintiff, giving as a reason that he claimed to own it.

The presiding judge, *Wells*, C. J., ruled that, where a person is proved to be the owner of personal property with the present right of possession, the presumption is, that he continues to be owner, with the right of possession, until there is evidence that he has parted with that ownership or right of possession; and the mere fact that the property is in the possession of another, with his consent, does not raise a legal presumption of change of title, so as to shift the burden of

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proof upon the original owner, to show that he retains his right of property and his right of possession thereon; but such change of possession, with the accompanying circumstances, is evidence to go to the jury, of such change of ownership or right of possession.

The jury returned a verdict for the plaintiff, and the defendant excepted.

R. F. Fuller, for the defendant, cited 1 Greenl. Ev. § 34; 2 Saund. Pl. (2d ed. by Lush) 1152; *Pinkham v. Gear*, 3 N. H. 484; *Brancker v. Molyneux*, 3 Man. & G. 84; *Jones v. Sinclair*, 2 N. H. 319; *Ewell v. Gillis*, 2 Shepley, 72; *Demick v. Chapman*, 11 Johns. 132; *Hoyt v. Gelston*, 13 Johns. 141, 150, *Waterman v. Robinson*, 5 Mass. 303; 2 Steph. N. P. 1556; 3 Starkie on Ev. 1196; *Merritt v. Lyon*, 3 Barb. Sup. Ct. R. 110; 1 Phillips Ev. (Cowen & Hill's notes,) 452; Campbell's Lives of the Lord Chancellors, vol. 6, p. 439; 2 Phill. Ev. 39; *King v. Milsom*, 2 Camp. 5; *Trougott v. Byers*, 5 Cowen, 480; *Twyne's case*, 1 Smith's Leading Cases, (Hare & Wallace's notes,) 44; *King v. Milsom*, 2 Camp. 5; 1 Chit. Pl. by Perkins, (10th Am. ed.) 157; *McCombie v. Davies*, 6 East, 538; Broom's Legal Maxims, 43; *Ad questionem legis non respondent juratores*. Adam's Trial by Jury, 164.

J. Brown, for the plaintiff, cited 1 Greenl. Ev. § 41; *Alderson v. Clay*, 1 Starkie R. 405; *Brown v. King*, 5 Met. 173; *Ricard v. Williams*, 7 Wheaton R. 59, 109; *Livingston v. Peru Iron Co.* 9 Wend. 511, 520-1; *Baynard v. Colefax*, 4 Washington, 41. Ownership being once proved in the plaintiff is presumed to continue, until an alienation is shown.

SHAW, C. J. This is an action of trover for furniture, in which a verdict was found for the plaintiff, and the case comes before us on the defendant's exceptions. This cause has been very elaborately argued, but, when understood, it appears to us to be governed by a few plain principles. It turns upon the directions of the judge, who tried the cause, in matter of law.

It is to be regretted that the facts appearing on the trial, showing the relations of the parties, and the circumstances

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under which the goods, admitted to be the property of the plaintiff, came into the possession of the defendant, are not stated, in order to show the application of the rule of law laid down by the court. Such circumstances will usually indicate what was the nature and character of such change of possession, whether in consequence of a sale or temporary loan, or how.

The plaintiff is proved to be the owner of the property, and that right of property will continue until a change proved as by sale, lien, or voluntary loan. Whoever relies on such change must prove it; the proof lies on him. All that appears in the present case is, that the property came into the possession of the defendant, with the plaintiff's consent.

How? On what trust or contract? This does not appear. Demand of the goods was made, and a refusal to deliver them by the defendant to the plaintiff, on such demand, before action brought, and this is evidence of a conversion, conclusive, if not rebutted. We are then called on to consider the directions given by the judge on the trial.

The first was, that presumption of ownership continues until some alienation is shown. This is correct. A party having this ownership does not lose it, by permitting another to be in possession. The ordinary mode of proving property is, proving that it was purchased and paid for, and it will be deemed in law to be the purchasers' until something is shown to change the title, and merely parting with the possession affords no conclusive evidence of such change. Possession is *prima facie* evidence of title, good against everybody but one proving property; that is, against any one but the right owner. *Armory v. Delamirie*, 1 Stra. 505. This case of the chimney sweeper's boy, from *Strange*, well illustrates these principles. A chimney sweeper's boy, having found a jewel, carried it to a goldsmith, to ascertain its value, but the goldsmith, by his apprentice, detained it, and refused to restore it. The boy having brought trover, it was held that his possession was some evidence of property, good against any one but the true owner, and that he could maintain trover for it, on such *prima facie* proof of title; and that refusal to restore it to him, on demand, was evidence of a conversion.

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The defendant's possession was *prima facie* evidence of title in him, but it was rebutted by proof of prior possession, and actual ownership, on the part of the plaintiff. The burden of proof was on her, and she sustained it by proof of title.

Exceptions overruled and judgment on the verdict for the plaintiff.

JOSEPH LOVERING vs. WILLIAM MINOT & others, Executors.

Under a will by which all the residue and remainder of the testator's estate is given to trustees, in trust to pay over and distribute the income to and among his five children, one fifth to each, during their respective lives, with remainder over, such children are entitled to their respective proportions of the income of such residue from the decease of the testator.

Under a will by which the testator gives all his property in trust, with power to the trustees to sell and reinvest, and to make partition and division of the same, and to pay to the beneficiaries the income of the respective shares assigned to them, if the property remains undivided, each beneficiary is entitled to his proportion of the income actually earned by the trust fund, whether it exceeds six per cent or not.

THIS was an action of assumpsit, on the money counts, to which the defendant pleaded the general issue. The parties agreed upon the following statement of facts.

Joseph Lovering, of Boston, the father of the plaintiff, died on the thirteenth day of June, 1848, testate, and his will, to which there were two codicils, was proved in Middlesex county, (the judge of probate for Suffolk county being interested in the estate,) on the fourteenth day of December, 1848.

The testator, after giving sundry legacies and devises, part of them in trust to Charles Wells and William Minot, proceeds in the tenth clause as follows:—

“I give to said Minot and Wells, and to the survivor of them, his executors, administrators and assigns, twenty thousand dollars; but in trust, nevertheless, for the intents, uses and purposes as follows, and none other, namely: in trust to invest said sum on interest, and the net interest and income

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thereof to pay to my said son Joseph, [the plaintiff in this suit,] half-yearly or oftener, if convenient to my trustees, during his natural life, &c.

And in the second clause of his first codicil as follows:—

“I give to my son, Joseph Lovering, the income of four thousand dollars, during his life; and at his decease I give said four thousand dollars to his heirs at law.”

In the 3d, 5th, 15th, and 17th clauses of his will, and in the 5th clause of the first codicil, the testator gives to the same trustees the following pecuniary legacies, in trust, namely. \$30,000 for the benefit of his wife; \$10,000 for the benefit of his daughter Susan; \$8,000 for the benefit of his daughter Caroline; \$20,000 for the benefit of his son Nathaniel, with remainder over. The trusts declared respecting these legacies are similar in terms and limitations with that declared in the 10th clause for the benefit of his son Joseph, and the interest and income thereof is to be paid to the beneficiaries, “half-yearly, or oftener, if convenient to my trustees.”

The testator then proceeds, in the nineteenth clause of his will, as follows:—

“I give to said Minot and Wells, their heirs, executors, administrators and assigns, and the survivor of them, his heirs, executors, administrators and assigns, all the residue and remainder of my estate, real and personal, of every nature and description, including the reversion and remainder of all sums of money herein before given to said trustees for the support of life annuities to my wife and children and the widows of my children, and not given over after the decease of the annuitants; together with all the estate, real and personal, which may be released to my trustees by the heirs or assigns of George Gay, Esquire, and by my wife, and all my property and estate, not bequeathed or devised in this will, whether in possession or reversion; but in trust, nevertheless, for the intents, uses and purposes as follows, and none other, namely: in trust to take care of and manage said estates, to take the rents, income, interest and profits thereof, and after deducting all necessary and reasonable expenses and charges for the care and management of said real and personal estate, and incident

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to the execution of the trusts created in this will, to pay over and distribute the net rents, income, interest and profits thereof, to and among my five children, William Lovering, Nancy Gay, Caroline Worthington, Joseph Lovering, Junior, and Nathaniel Philip Lovering, one fifth to each, during their respective lives, half-yearly, or oftener, if convenient to said trustees, &c."

In the twentieth clause, after giving his trustees very full powers as to investment, sale, &c., of the trust property, the testator declares :—

"That said trustees may, whenever they consider it expedient or necessary, make partitions and divisions of the estates and property held by them, or of any portion thereof, and may authorize the several parties for whose benefit said trusts are created, to take the income and profits of their respective shares; that, in the distribution of personal property, they may assign the stocks in which such property is invested, at their market value; that, in the distribution of several sums of money and estates above devised and given in trust, (except where it is otherwise ordered and directed,) the representatives of any deceased child or children shall take the share to which his, her, or their deceased parent or parents would have been entitled, if living."

In the seventh clause of the first codicil, the testator says :—

"I direct that the annuities, given in my will and in this codicil, shall commence immediately after my decease."

By the second codicil, Nathaniel P. Lovering was united and made co-trustee with Wells and Minot, in all the trusts of the will, and the same parties were appointed executors; Wells declined the trust of the executorship, and Minot and Lovering accepted that trust, and letters of executorship were duly issued to them. They all three accepted the office of trustees.

On the ninth day of January, 1849, the executors filed an inventory of Mr. Lovering's estate, which comprised sundry parcels of real estate, principally in Boston, appraised at the sum of \$99,000, stocks to the amount of \$77,493, notes and mortgages to the amount of \$122,665.60 and furniture, &c., to the amount of \$3,440.19

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On the thirteenth day of February, 1849, the executors filed their account, wherein they charge themselves:—

" With the amount of personal property exhibited in the inventory	\$203,588.79
Sundry small items, not inventoried	210.00
Interest, dividends and income received per schedule A.	7,268.92
Total	<u>\$211,067.71.</u>

And they ask allowance of the following charges:—

" Sundry pecuniary legacies paid (not those given in trust) . . .	\$42,850.00
Sundry specific " " " " " " " " . . .	10,087.12
Debts and charges of administration	10,634.20
Amount retained to pay interest, as per testator's bond	1,500.00
	<u>\$65,071.32,</u>

The account then proceeds thus:—

"The said executors also represent that the said testator, in and by said will gave and bequeathed sundry specific sums of money to William Minot, Nathaniel P. Loving and Charles Wells, in trust for the intents, uses and purposes set forth in said will, the interest thereon to commence at his decease, to wit:—

" For the use and benefit of his wife, Mary L. Loving, and for other purposes	\$30,000.00
Interest from testator's death	1,200.00
For the use and benefit of Susan M. Loving, and for other purposes	10,000.00
Interest from testator's death	400.00
For the use and benefit of Joseph Loving, and other purposes . . .	20,000.00
Interest from testator's death	800.00
For the use and benefit of Caroline Worthington, and other purposes	8,000.00
Interest from testator's death	320.00
For the use and benefit of Nathaniel P. Loving, and other purposes	20,000.00
Interest from testator's death	800.00
For the use and benefit of Joseph Loving, and other purposes . . .	4,000.00
Interest from testator's death	160.00
	<u>\$160,751.32</u>
Leaving a balance of	<u>50,316.39</u>

\$211,067.71

Which said balance or residuum of his personal estate the said testator gave and bequeathed to the aforesaid William Minot, Nathaniel P. Loving and Charles Wells, in trust for the intents, uses and purposes set forth in said will.

And the said executors pray that the aforesaid specific sums given in trust as aforesaid, with the interest thereon, as herein charged, together with the aforesaid sum of \$50,316.39, being the balance or rest and residue of his personal estate, may be allowed in discharge of their trust as executors, they having applied and paid the same to the said trustees, to be held in trust, agreeably to said will; all which, with the exception of \$4,919.69 in cash, in the hands of said Minot, consists of the notes, stocks, and obligations contained in said inventory."

Loving v. Minot & others, Executors.

On the twelfth day of June, 1849, the trustees filed an inventory of the trust estate, which exhibits, besides real estate, stocks appraised at the sum of \$43,051, and notes and mortgages to the amount of \$99,943.70.

It is admitted that the items of the above account are correctly stated; that the interest there stated as paid on the pecuniary legacies given in trust, and as accruing from the death of the testator, was estimated at the rate of six per cent per annum; that, of the interest, income, and dividends received, as stated in the account, a portion was earned between the death of the testator and the settlement of the account, by the residue of \$50,316.89, but that no part of the income so earned has been paid to the beneficiaries named in the nineteenth clause of the will, but is merged in the residue; that all the trust property delivered by the executors to the trustees has been held by them since the testator's decease, in common and undivided, no division nor partition thereof into the several trusts having been made. And it is admitted that the income earned by the whole trust-funds, during the year subsequent to the testator's decease, was more than six per cent.

The plaintiff contended,

1. That he was entitled to receive income, or his proportionate part thereof, on the residue of the testator's estate, from the time of the testator's death.

2. That he was entitled to receive income on the legacy of \$20,000, given in trust for his benefit, and on the legacy of \$4,000, in the proportion of the whole net income earned by the whole joint trust property and estate.

If, in the opinion of the court, the plaintiff is so entitled, then a default is to be entered, otherwise a nonsuit.

W. Minot, Jr., for the plaintiff.

1. By the terms of the will, the plaintiff, as beneficiary, is entitled to income on the residue and remainder. See especially the 10th and 19th clauses of the will, and the 2d and 7th of the first codicil.

2. As a general rule of law, income on the residue and remainder is to be reckoned from the death of the testator.

Lovering v. Minot & others, Executors.

Angerstein v. Martin, Turn. & Russ. 232; *Hewitt v. Morris*, ib. 241; *Lamb v. Lamb*, 11 Pick. 371; 2 Roper on Legacies, 1320; *Williamson v. Williamson*, 6 Paige, 298; *Minot v. Amory*, 2 Cush. 377.

3. The executor's account was erroneously settled. Debts, &c. should have been paid from the principal, and the income not merged in the capital. *Minot v. Amory*, 2 Cush. 377.

There was no appearance for the defendants.

SHAW, C. J. This was an action of assumpsit by Joseph Lovering, son and legatee of Joseph Lovering deceased, against William Minot and Nathaniel Lovering, executors of the will of Joseph Lovering, Senior.

1. The first question is, whether the plaintiff, as one of the five children, to whom the income of the residuum was given after paying debts and legacies, and setting apart sums given in trust to raise annuities, is entitled to the income which accrued during the first year after the testator's decease.

After giving to the trustees a sum of \$20,000, and \$4,000 in trust to pay the income to his son, the plaintiff, and similar sums upon similar trusts for other children, the testator directs, that the residue be disposed of as follows:—

"I give to said Minot and Wells, (trustees,) all the residue and remainder, &c., (personal,) in trust, to invest, &c., and pay over and distribute the net income to and among my five children, William, &c., (including Joseph, Jr.,) one fifth each, during their respective lives, half yearly, or oftener,"—then over, with special and detailed directions.

Under this will, the court are of opinion that the plaintiff is entitled to one fifth part of all the income which accrued upon the residuum of the fund, from the time of the decease of the testator.

In the case as it exists upon the facts, it appears that there was an abundance of personal property to meet the debts and pecuniary legacies and from the trust funds, to raise annuities or incomes in the nature of annuities; and the *cestui que trusts*, to whom the income of the residue is given, are entitled to the whole of that income from the decease of the testator.

And, although it could not be immediately paid over, be-

cause the executors could not know how much would be wanted, and what the residue would be, yet the accounts, when afterwards made up, would show what part of the income accrued from capital, and what part from income accumulated, and then the income due to each would be ascertained.

We think, therefore, that, when the funds were transferred from the executors to the trustees, the assets showing what was received from income and what from capital, it was the duty of the trustees to distribute that part of it which was composed of interest, and retain the amount of capital as it existed at the decease of the testator, as the capital sum, constituting the residue, to be invested and held under the trust.

There has been some conflict of authorities on this subject. Some of the earlier cases seem opposed to this view, and tend to show, as a general rule, that interest upon a residue shall not commence till the expiration of the year. *Sitwell v. Bernard*, 6 Ves. 520; *Stott v. Hollingworth*, 3 Madd. 161; *Taylor v. Hibbert*, 1 Jac. & Walk. 308.

But the later cases have settled it the other way, as we think, quite decisively. *Angerstein v. Martin*, Turn. & Russ. 234; *Hewitt v. Morris*, Ib. 241. And the same rule has been adopted in New York. *Williamson v. Williamson*, 6 Paige, 298.

And these cases seem to the court to have decided the question upon just principles.

It is a question between the first *cestui que trust* for life and the remainder-man. The effect of a different decision would be to apply the first year's income to increase the capital; to take it from the first taker, and apply it to an accumulation for the benefit of the future taker.

It is contrary to the presumed intent of the testator, to narrow the benefit intended for the first object of his bounty, for the benefit of an object more remote.

Besides, the words of the will are, "the income," with nothing to restrain them, and make them include anything less than the whole income.

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2. Upon the other point the court are of opinion that the plaintiff is entitled to his proportion of the income actually earned by the trust fund, whether it exceeds six per cent or not.

The testator authorized his executors and trustees to retain the same stocks in which his property was invested at his decease, or transfer them and reinvest. He also authorizes them to keep the whole together, or make partition. In fact, they have kept the whole together. Had they made partition and assigned to the fund, for the plaintiff, stocks paying more than six per cent, the direction of the will is clear, to pay the net income to him. So long as all remain together, all must share any excess or deficiency in just proportion.

Defendants defaulted.

PATRICK MURRAY & another vs. TERENCE MCHUGH.

JAMES MOORE vs. THE SAME.

DANIEL CROWLEY vs. THE SAME.

PATRICK CARBERRY vs. THE SAME.

The plaintiffs and defendant were members of a voluntary unincorporated association, for raising money to aid the people of Ireland in their struggle for independence. The plaintiffs with others, contributed moneys for this object, which were handed to the defendant, as treasurer of the association, and by him placed with the general funds thereof. The final application of the contributions was to be made by a directory, chosen by the association; but by a vote of the majority, the defendant temporarily invested the funds in stocks. The object of the association failed, and no money was applied for that purpose, but there were some incidental charges and expenses, and losses by bad investment. Held, that an action for money had and received would not lie to recover of the defendant the amount of any contribution.

THESE were actions of assumpsit for money had and received. They were heard in the court of common pleas, before *Bigelow, J.*, on the following agreed statement of facts, and, judgment having been ordered for the defendant in all of them, the plaintiffs appealed to this court.

Murray & another v. McHugh.

In the evening of August 16, 1848, a general meeting of the friends of Ireland was held in Faneuil Hall, in Boston. The meeting was organized by the choice of a chairman and secretary, and the objects of it were announced to the meeting by the chairman to be the contribution and collection of funds, for the purpose of assisting the people of Ireland in the struggle for independence, which they were at that time making against the government of Great Britain, and to purchase arms, ammunition, and other sinews of war.

At the close of the meeting, many persons contributed divers sums of money, and, among the number, the several plaintiffs in these actions, who subscribed and paid in manner following. The chairman called upon persons present to subscribe. Murray then handed one hundred dollars to the chairman, asking him to announce it as the subscription of P. & W. Murray, which was done, and the money paid to the defendant by the chairman. The same was done by the plaintiff Crowley, and the money paid to the defendant. The plaintiff Moore, at the same time, engaged to pay fifty dollars, which, the next day, he accordingly paid to the defendant. The plaintiff Carberry, who was present at the meeting, as well as the other plaintiffs, announced his subscription at the same time, and delivered, on the next day, the sum of one hundred dollars to a messenger, who, at his request, paid the same to the defendant.

It was agreed that these sums were severally paid by the plaintiffs to the defendant, to be used for the objects and purposes stated by the chairman of the meeting, namely, to assist the people of Ireland in their struggle for independence. About a month after that meeting, news arrived at Boston, that the attempt of the people of Ireland to obtain their legislative or political independence of Great Britain had been defeated, and the moneys paid, as above stated, have never been applied to the above named purposes.

On the 3d of November, 1849, each of the plaintiffs demanded of the defendant the sum paid to him by them respectively, and the defendant refused to pay, assigning no reason for his refusal; and the moneys had not been appro-

priated to the above purposes, or to any other, except so far as they may be liable for proportional contribution to incidental expenses.

The defendant, in each of these actions, relied on the following facts in defence of the same, all of which were admitted by the plaintiffs, subject to exceptions as to competency.

On the 15th of August, 1848, there existed in Boston two unincorporated associations of individuals, occasionally holding separate meetings to raise charitable contributions for the aid of the people of Ireland. One of these bodies bore the title of the "Boston Association of the Friends of Ireland," and the other that of the "Boston League." In the evening of the 15th of August, at a meeting of the "Association of the Friends of Ireland," twenty-four of its members were appointed to act in concert with twenty-four other members from the "Boston League," the whole to constitute a joint body of forty-eight members, under the title of the "Boston Directory of the Friends of Ireland."

The plaintiffs, with the exception of Carberry, were members of the directory. In the forenoon of August 16, 1848, the directory met at Central Hall, in Boston, for the purpose of organizing their body, and "also to consider measures expedient for the purpose of carrying into effect the efforts of the people of Ireland towards the freedom of that country." The directory was organized by the choice of a chairman, secretary, and treasurer, the defendant being elected to the last named office. The directory then elected nine of their members to represent them, under the title of the "Executive Committee," who were authorized to meet daily, if required, to discharge the general functions of the directory. The officers of the directory above named were chosen members of the "executive committee," and acted as chairman, secretary, and treasurer, respectively, of both bodies.

The meeting held at Faneuil Hall, in the evening of August 16, 1848, had been previously called by the "Boston League," before the union of the two bodies under the government of the directory, which took no part, officially, in that meeting.

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On the 17th of August, the executive committee met, and directed their chairman to prepare and report, on behalf of the directory, an "Address to the Friends of Ireland in New England," in relation to the interests of Ireland and the particular objects of the directory. On the following day, the subjoined address was reported and adopted on behalf of the directory, and signed by the executive committee, published in the newspapers of the 18th of August, and distributed in the form of a circular.

" TO THE FRIENDS OF IRELAND IN NEW ENGLAND.

" The destiny of the Irish people may depend upon the result of your exertions within the brief space, perhaps, of but a few days.

" England has rendered the doctrine of pacific agitation obsolete in Ireland, and has silenced its most eloquent teachers. She has proscribed the Irish leaders, as she once proscribed yours. She has driven the people of Ireland, as she once drove Americans, 'to fight with cheerfulness the battle of Israel.'

" That people are about being crushed, under this new confederacy of war with pestilence and famine. In the first agony of the struggle, they turn to their kindred in the flesh, to their brethren in humanity, who are looking on, in comfort and safety, from this land of freedom, and supplicate for assistance. Money yields the swiftest and mightiest aid. Every dollar contributed by you will be speedily converted by trusty agents into the most effective means of relief.

" New York intrusts its imperial resources to the management of a directory composed of eminent friends of Ireland; of Robert Emmet, Charles O'Connor, John McKeon, Horace Greeley, and their philanthropic associates.

" The friends of Ireland in Boston have united in establishing a corresponding body, to act in the impending crisis. That body is entitled 'The Boston Directory for Ireland.' It is composed of forty-eight members, but, to insure frequent sessions and prompt action, they have selected nine of their number, to be an executive committee, who sit daily, in Boston, to discharge the general functions of the directory.

" This executive committee for Ireland is composed of the undersigned members; of whom John W. James is chairman, Edward Young is secretary, and Terence McHugh treasurer. John Kelly, Patrick Mooney, and P. Higgins, are the committee on accounts. The action of the executive committee, in relation to its funds and its delegates, will be governed by the following regulations.

" 1st. The committee sit daily, to appoint delegates to agitate for Ireland in Massachusetts, and, if required, for the New England states generally. All letters and communications on this subject must be forwarded to Boston, addressed to 'John W. James, Chairman of the Executive Committee for Ireland,' or to 'Edward Young, Secretary' of the committee. Requisitions for speakers, or for aid in calling meetings in any part of New England, will be promptly answered by the officers of the committee.


" 2d. The executive committee have been authorized by the directory, to exercise a constant control over all the collections made under their superintendence.

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All sums collected at public meetings, or by private contributions, will be publicly announced at the meetings and through the press, and the money so collected must be transmitted by the chairman of each meeting in sealed letters, directed to the treasurer, or to the chairman of the executive committee.

"No part of the sums thus collected and forwarded is to be appropriated to the expenses of delegates from the committee, but by an order from the committee on accounts, drawn on the treasurer. The committee on accounts will allow only the necessary and unavoidable expenses of the delegates.

"3d. The executive committee have appointed from their own body a confidential agent, to confer with a similar organ of the New York Directory; and, upon the report of their agent, the committee will determine whether the funds collected under their superintendence shall be appropriated to their destined purpose by the Boston or the New York Directory, the committee having solely in view, in such decision, the most speedy help and the best interests of the people of Ireland.

" Editors friendly to the cause of Ireland are respectfully requested to publish the above notice in their respective papers."

Under the conditions thus announced, all the funds received by the executive committee were transferred to the defendant, their treasurer. The executive committee, for several weeks, continued their sittings, for the purpose of appointing meetings and delegates to attend the same, and receiving remittances from various meetings in the commonwealth and other parts of the country, contributed by many hundred persons; it being understood, that all the expenses attending the proceedings of the directory and executive committee should be, from time to time, deducted from the funds collected.

On the 27th of November, 1848, the executive committee, by a notice served on each member, called a meeting of the directory, to determine what disposition should be made of the funds already collected. It was then and there voted, "to invest the net amount in the treasury, for six months from the time of the investment."

Twenty-nine members were present at that meeting; eighteen voted in the affirmative, and ten in the negative, upon the proposition to invest. Among the votes in the negative were those of the plaintiffs Murray and Moore. The plaintiff Crowley was present, but did not vote either way. The plaintiff Carberry was notified, but was not present. After the vote, John Kelly and the plaintiff Moore were appointed a committee to assist the treasurer in making such an investment as to them should seem most safe and productive.

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On the 2d of December following, Kelly and Moore recommended, in writing, to the treasurer, to purchase twenty-five shares of the Old Colony railroad stock, and, out of the balance remaining, to pay all bills against the directory, and, adding the remainder to dividends to be received in the January following, to invest again, as the committee might direct; with which direction the treasurer complied, the cost of the shares averaging eighty-seven dollars and twenty-two cents each, but they have since greatly depreciated in value.

On the 19th of February, 1849, Kelly and Moore recommended the treasurer to buy three shares in the stock of the Western railroad with the balance, which was accordingly done. On the 1st of March, 1849, the plaintiff Moore borrowed the balance remaining in the treasurer's hands, namely, sixty dollars, for which Moore gave his note, which remains due and unpaid. The stocks purchased stand in the name of the defendant, and have always so stood.

On the 2d of July, 1849, there was another meeting of the directory, to consider what further order should be taken in relation to the funds; when it was voted, that the funds of the directory be held for the original purposes, and that they be increased by additional subscriptions; and William A. Wilson, the secretary, and Patrick Murray, one of the plaintiffs, were appointed a committee to solicit subscriptions generally for the funds of the directory, and to call upon the old subscribers, who were delinquent, to pay up their subscriptions. No money was ever collected under this vote.

The money sought to be recovered by each plaintiff in these actions was mixed with the other funds contributed and invested, as above set forth. Each of the plaintiffs, except Carberry, is a member of the directory, and has been so from its foundation.

It is agreed, that the court may make such inferences from the foregoing facts as it would be competent for a jury to make, and, if the plaintiffs are not entitled to recover, they shall severally become nonsuit. Otherwise, the defendant shall be defaulted, and judgment rendered for such damages as the court shall deem proper.

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I. J. Austin, for the plaintiffs.

H. H. Fuller, for the defendant, cited Collyer on Part. §§ 197, 1078, 1079; 3 Kent's Com. 45; *Howson v. Hancock*, 8 T. R. 575; Story on Agency, § 300; *Williams v. Henshaw*, 11 Pick. 79; *Crease v. Babcock*, 10 Met. 525; Chitty on Cont. 231, and note, 639; Rev. Sts. c. 81, § 8, and c. 118, § 43.

SHAW, C. J. These are actions for money had and received, and the grounds taken by the plaintiffs are correct to this extent, that no other privity is necessary to enable one to maintain an action for money had and received against another, than an equitable duty to pay it over, according to the trust on which he has received it. So, when one has deposited money with another, with authority to apply it to a special use, for objects on account of which the depositor owes no debt or duty, if the authority is revoked before the accomplishment of the purpose, and before the depositary has disposed of the money pursuant to the trust, the depositor may demand it back, and from that time it will be deemed to be money held to the use of the depositor, which he may recover in this action.

Nor does it appear to be material to this position, whether the object to be accomplished be legal or illegal. If it be legal, but the purpose fails, the consideration on which it was deposited fails, and then the defendant can no longer conscientiously retain it; he is bound to pay it back, and this raises an implied promise to do so. If the purpose be illegal, if the depositary has paid the money for the accomplishment of such purpose, the depositor is in *pari delicto*, and cannot invoke the aid of the law to recover it. *Howson v. Hancock*, 8 T. R. 575. But if not paid over, he may revoke the authority of the depositary, and thus prohibit him from promoting the illegal object, and recover back his money. *Bell v. Gilbert*, 12 Met. 397.

But these rules have very little application to the present case; the facts disclosed do not bring the case within them.

In the first place, the money can hardly be said, in any proper sense, to be paid by the plaintiffs to the defendant. It was money in fact paid in, or promised to be paid in, at a

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public meeting of the friends of Ireland, organized as mere voluntary unincorporated associations are usually organized, for raising money to assist the people of Ireland in their struggle for independence with the British government. At this meeting, the chairman or presiding officer called upon the persons present to contribute money for the object contemplated, and, towards the close of the meeting, many persons did contribute. Murray, the plaintiff, handed \$100 to the chairman, and requested him to announce it as the contribution of himself and W. Murray. And this was done by many others. The money was handed to the chairman, in the first instance, and by him to the defendant. It appears that, prior to the meeting and immediately preceding it, two different associations of the friends of Ireland had united, for the better promotion of their common object, and had chosen a body of forty-eight persons, denominated "The Boston Directory of the Friends of Ireland;" that this body had met and chosen a chairman, secretary, and treasurer, and the defendant was thus appointed treasurer.

Then the question recurs, to whom was the money paid, by whom was it received, and who were to accomplish and carry into effect the purpose of the contributors, by the application of the money raised? It seems manifest that such application of the money was to be made by the body of forty-eight, appointed as an administrative body for the purpose, and that the chairman was the agent of the contributors, in the first instance, to receive the money, and the treasurer to take and keep it, subject to the disposal of the directory. In legal effect, therefore, it would seem that the money was received by the directory. This was a numerous body of trustees, certainly, and not very regularly constituted; but they were such as the contributors, having the power of disposal over their own money, chose to select. The general purposes to be accomplished by the directory, in the application of this money, are shadowed forth in the address, which is made part of the case.

The defendant did not receive the money on any trust or condition, to account with the plaintiffs; because, with their

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consent and by their appointment, he is to pay it out, under the order and direction of the directory, and to be accountable to them for it.

Again; the whole proceeding looked to associated and continued action. One object seems to have been, to assist the Irish people with arms. But how? The defendant was intrusted with no power to lay out the money in arms, or to send them to any body. The parties proposed to act in concert with other parties, having the same common object in view. The contributors looked to the aggregate body, to direct the application of their donations. By their order and direction, the defendant did invest the money in stocks, and thereby parted with the possession of the money. When a committee of the directory was chosen to act, and there was no by-law or other provision to regulate the exercise of their authority, the vote of a majority must be deemed the act of the body. Then, the money having been invested pursuant to such vote, before any revocation of the authority given by the defendant, if, as maintained by the plaintiffs, he had any power of revocation, the defendant had no money of the plaintiffs when they made their demands and brought their actions.

The vote of the plaintiffs, or some of them, in the negative, cannot avoid this result; by voting at all, they tacitly submitted to the jurisdiction of the committee, and admitted their authority to decide, in a case where the act of the majority was the act of the body.

But there is another view of the subject, which seems to us to be entirely decisive. It is quite clear, that these plaintiffs, with many other persons, put in their respective sums as contributions to a common fund for a designated purpose. The terms import this; "they subscribed," "they contributed;" all implying that the donations of each were parts, the whole of which were to form a common fund. In fact, these sums were mixed and blended together, and invested in a common fund. Then they were necessarily liable to some incidental charges, contemplated by the establishment of the directory; expenses of delegates to other places, for the general purpose of agitating.

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Such being the character of the fund, the right of each individual to any portion of it, after the failure of the purpose for which it was raised, if any surplus should remain, was a right to a proportional part of such surplus, after deducting all charges and expenses, and all losses sustained by bad investment, or otherwise. It would require an account to be taken amongst all the contributors, having equal rights to such surplus, to ascertain the proportion to which each of these plaintiffs would be entitled; and such an account cannot be taken in an action at law for money had and received.

It seems obvious to the court, therefore, that the contribution of each of these plaintiffs was not a simple deposit with the defendant, to hold on any condition or contingency, to be judged of or determined by him; or, to hold and apply upon the simple happening of a future event, which event has not happened; or, upon any trust or confidence reposed in the defendant, which he has failed to perform; and, therefore, it is not within the principle, that, when money has been received of another, for a purpose or on a consideration which has failed, on which the authority on which it was deposited may be revoked, and, after demand and refusal of repayment, it may be recovered back in an action for money had and received.

Judgment for the defendant, in each case

GEORGE W. GERRISH vs. GEORGE W. NORRIS.

If a party, who is, by his covenant, bound to receive a deed from another, makes specific objections to the deed, this is a waiver of all others which are of such a nature that, if stated by the party, they might have been obviated by him who was to deliver the deed. In such case, if the objection taken is removed, the others are to be treated as waived.

In an action for a breach of covenants entered into by the plaintiff and defendant, for mutual conveyances of land, the defendant having refused to accept the deed tendered to him by the plaintiff, by reason of specific objections to the deed taken by him at the time of the tender, it is correct for the judge to instruct the

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jury that, if the defendant used language intended and calculated to convey to the plaintiff the idea that he waived all other objections, he would be estopped from setting up other objections.

THIS was an action of covenant, tried in the court of common pleas, before *Wells*, C. J., and brought before this court by exceptions taken by the defendant.

On the fourteenth day of February, 1849, the plaintiff and defendant duly executed an indenture under seal, whereby Gerrish agreed to make and deliver to Norris "a good and sufficient quitclaim deed, with the usual covenants of warranty, from those claiming by, through or under him, and release of dower, of land and stable lying and being upon Prescott street, so called in said Lowell, thereby conveying, assigning and transferring all the right, title and interest to said Norris, which said Gerrish has or may have to said land and stable;" and in consideration of the above agreement, Norris agreed "to execute and deliver, or cause to be executed and delivered to Gerrish, a good and sufficient quitclaim deed, with the usual covenants from those claiming by, through, or under him, of warranty and release of dower, of land and barn, situated, lying and being in Dracut, in said county of Middlesex, in Centralville, so called, adjoining land of Paul Perkins, on Walnut street, so called, in said Dracut, containing twelve hundred and one third feet."

The plaintiff, to prove the performance of the covenants on his part, offered evidence tending to show that, previous to the commencement of this action, he had tendered to the defendant a quitclaim deed, with release of dower, the description in which was as follows: "A certain tract of land situate upon Prescott street, in said Lowell, with a stable standing upon the same, said tract of land and stable being the same formerly occupied by Lawrence B. Norris, as a stable, and the same mentioned and described in a bond from Royal Southwick to Cyril Coburn, recorded in Middlesex registry of deeds, which bond was assigned to said George W. Gerrish, and was, afterwards, by the request of the said George W. Norris, assigned to one Parker, of said Lowell; meaning and hereby intending to transfer to said George W

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Norris, all right, title and interest which I, the said Gerrish, have or may have to said land and stable;" that the defendant said he did not know about the deed, as he was not much used to the conveyance of land, but that he would give the plaintiff an answer next day; that, at this interview, the plaintiff offered, if there were any objections to the deed, to alter it, so as to make it satisfactory; that, the next day, the defendant called at the office of the plaintiff's counsel, and said that he could not take the deed, for it stated untruly the fact, that he requested that the bond should be assigned to Parker, and because, since making the agreement, the plaintiff had conveyed all his interest in the land.

There was also evidence tending to show, that the defendant also said, at the same time, that he would take a deed according to the bond; and other evidence bearing upon the question of waiver.

The defendant admitted that the objections made by him, as above stated, were unfounded in fact.

The presiding judge ruled, that the deed tendered by the plaintiff was not a compliance with certain covenants which were mutual and dependent covenants, but these covenants were other than those which were objected to by the defendant, at the time of the tender.

The plaintiff claimed that, by not taking the objection to the deed at the time it was tendered, which he now raised, the defendant must be considered as having waived all objections to the deed, but those then taken.

Upon this question the presiding judge instructed the jury that, although the deed was not such as the defendant was bound to receive, yet if, from all the evidence, they were satisfied (the burden of proof being upon the plaintiff) that the defendant waived all objections to the deed, except those which he stated to the plaintiff, or that he used language intended and calculated to convey to the plaintiff the idea that he waived all other objections, he would be estopped from setting up other objections to the deed in the present trial. To this ruling the defendant excepted.

B. F. Butler, for the defendant.

H. F. Durant, for the plaintiff.

DEWEY, J. If a party, who is, by his covenant, bound to receive a deed from another, makes specific objections to the deed, this is a waiver of all others that are of such a nature that, if stated by the party, they might have been obviated by him who was to deliver the deed. In such case, if the objection taken be removed, the others are to be treated as waived. *Todd v. Hoggart*, Moody & Malkin, 128; Chitty on Contracts, (7th Am. ed.) 307, 310. Upon this more general ground, this case might perhaps have been disposed of. The case has been argued by the defendant more particularly upon objections to the instructions, in the precise form in which they were stated.

We do not understand that any objection is urged to the first branch of the ruling, "that, if the jury were satisfied, from all the evidence, that the defendant waived all objections except the one stated, it was sufficient to entitle the plaintiff to recover," but, upon the other branch of the instructions, "if he used language intended and calculated to convey to the plaintiff the idea that he waived all other objections, he would be estopped from setting up other objections."

This last clause seems to be little more than a commentary upon the evidence that would warrant a jury to find a waiver. If the party uses language suited or adapted by design, (both of which are definitions by lexicography of the word "calculated,") to express to the hearer his purpose of waiver, the jury might find such waiver, it would seem. Nor does the omission of the words, "if the plaintiff had acted thereon," necessarily affect the correctness of the ruling. If this had been properly a case of estoppel, set up against a third party, to defeat his right by reason of his acts or omissions, it might have been material to have introduced this element, that the other party had acted thereon. But, as a mere waiver between two parties to a contract, the instructions were correct, as to what would authorize the jury to find such waiver.

Exceptions overruled.

SLADE LUTHER vs. THE WINNISIMMET COMPANY.

No period less than twenty years will give to an owner of land any rights by prescription or adverse user against an adjacent owner, deriving title from the same grantor.

To constitute a watercourse from one tract of land into another, there must be something more than a mere surface drainage over the entire face of the first tract on to the second, occasioned by unusual freshets or other extraordinary causes.

In an action for damages, occasioned by the filling up by the defendants of their land, lying adjacent to that of the plaintiff, whereby the free flow of water off the plaintiff's land, as formerly existing, had been obstructed, instructions to the jury that "they should take into consideration the evidence on both sides bearing on this point, and, if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they would, in assessing the damages, make an allowance for such benefit, and give the plaintiff such sum in damages as they found upon the evidence would fully indemnify and compensate him for all the damage he had actually sustained," are correct.

THIS was an action of trespass on the case, tried before *Bigelow, J.*, in this court. The writ contained three counts. The first two alleged the obstruction by the defendants of an ancient watercourse, running through the plaintiff's land and land of the defendants; and the third alleged a right in the plaintiff to have the water, at all times, flow off his land and run through the defendants' land, as appurtenant to the premises described in the writ. The defendants pleaded the general issue.

It appeared in evidence, and was admitted at the trial, that the land and premises in question were a part of the tract of land in Chelsea conveyed to the plaintiff by Francis B. Fay and others, by deed dated May 1, 1833, and that a small portion of the premises described in the writ, on the northwesterly part thereof, formed part of a pond.

The plaintiff offered evidence that, at the date of the above conveyance, and subsequently thereto, there was a watercourse, or stream of water, flowing from land situated above the premises described, through a portion of those premises, into the pond, and thence, by a natural outlet on the north side of the same, upon certain marshes, from which it passed into Mystic river, and thence into the sea; and that such

watercourse drained off the water falling and accumulating on the plaintiff's premises into the pond.

It further appeared that, in October, 1849, the defendants filled up so much of the pond as was on their own land, and built a street through the same; and evidence was offered, that thereby the watercourse was obstructed, so that, in November, 1849, and on several subsequent occasions, the land and houses of the plaintiff, situate on the premises described, were overflowed and damaged by water standing thereon.

The defendants offered evidence which proved, and it was admitted at the trial, that Thomas Williams originally owned all the premises belonging to the plaintiff and defendants, and that, in 1831, he conveyed to Fay and others the entire premises, including the land and pond above described; that Fay and others, by the deed above mentioned, conveyed the premises described in the writ to the plaintiff, in which deed there was no grant or conveyance of any watercourse or right of drainage, the same being a common warranty deed, conveying the described premises with their appurtenances, &c.; that Fay and others, on the 1st of October, 1833, conveyed to the defendants all the land and premises granted by Williams, except the tract so conveyed to the plaintiff, and some small parcels previously conveyed to other persons; so that both the plaintiff and defendants claimed under a common grantor, by deeds bearing date within twenty years prior to the date of the writ.

The defendants offered evidence that the pond was not fed by a watercourse or running stream, but was a mere hollow or low place, into which, in seasons of heavy rains or melting snow, the water collected from the surrounding higher lands, where it became stagnant; that there was no outlet thereto, through which the water usually ran; that there was no watercourse, or stream of water, or place where water usually flowed, running through the plaintiff's land, and never had been; that the plaintiff's land, lying easterly of the pond, was part of a tract of low land which sloped gradually towards the defendants' land, at the rate of about nine inches in a hundred feet, except on the northerly side, where the land was

considerably higher; and that all the water which came into the pond from the plaintiff's land was merely the common surface water which ran off in times of heavy rains or freshets, not confined to any particular channel, but spread over the entire face of the land.

The defendants also put in a petition to the board of health of the town of Chelsea, dated in the summer of 1849, signed by the plaintiff and others, praying to have the pond filled up, as a nuisance; and a vote of the board of health thereon, directing the defendants to abate the same as a nuisance; and it was proved, that the filling up complained of by the plaintiff was done by the defendants in pursuance of such order of the board of health, with the approbation of the chairman and other members of the board; and that the plaintiff was sometimes present while the work was advancing, and made no objection.

The plaintiff offered evidence to show that, by such filling up and obstruction, his land and houses had been injured and greatly diminished in value.

To meet this evidence, the defendants called witnesses to prove that but little or no injury had been occasioned to the plaintiff's houses and land, and that the same had been, in fact, benefited and increased in value thereby.

After the defendants had closed their evidence, the plaintiff then called a witness for the purpose of showing that the plaintiff's land and houses had not been so benefited and increased in value, but were greatly injured; but, on examination, it appearing that he was not an owner of, or dealer in, real estate, in that vicinity or elsewhere, and possessed no other peculiar means of knowing the value of the property in question, the judge, in that stage of the trial, refused to receive the evidence.

The judge instructed the jury, among other things, that inasmuch as twenty years had not elapsed since the plaintiff took his deed from the same persons under whom the defendants claimed, he could not claim any rights against them by prescription, or adverse user, but that his rights were to be determined by his deed, and by the state of things as they

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were at the time of his purchase ; that, if there was a watercourse or stream of water running through the land conveyed, the right to the continued flow thereof would pass to the plaintiff under his deed, as parcel of his grant ; that, if there were no such watercourse or stream of water, the plaintiff could not claim a right of drainage or flow of water from off his land on to and through the defendants' land, merely because the plaintiff's land was higher than the defendants', and sloped towards it, so that the water which fell in rain upon it would naturally run over the surface in that direction ; that the petition to the board of health of the town of Chelsea, signed by the plaintiff, and the acts and doings of the board of health thereunder, operated as a license or authority to the defendants to fill the pond, and that, for so doing, the plaintiff could not recover damages in this action against the defendants ; and if the jury were satisfied that the plaintiff had sustained no damage except that occasioned by filling up the pond, their verdict must be for the defendants ; but that the petition and proceedings thereunder would not operate as a license or authority to stop and fill up a watercourse, in addition to the pond ; and if the defendants had filled or stopped up a watercourse to which the plaintiff was entitled, he could recover such damages as he had suffered thereby : — that the plaintiff must, therefore, prove, to the satisfaction of the jury, the existence, at the date of his deed, of a watercourse or stream of water, flowing from his into the defendants' land, as set forth in his writ ; that a watercourse is a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water ; that, to constitute a watercourse, the size of the stream was not important, — it might be very small, and the flow of the water need not be constant, — but that it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes ; and it was a question of fact for the jury to determine, upon the evidence before them, whether any such watercourse was proved to have existed.

Mather v. Bennett.

On the question of damages, the judge instructed the jury, that they should take into consideration the evidence on both sides bearing on this point; and if they were satisfied that the filling up had actually benefited the plaintiff's estate, in any particular, they would, in assessing the damages, make an allowance for such benefit, and give the plaintiff such sum in damages as they found, upon the evidence, would fully indemnify and compensate him for all the damage he had actually sustained.

The jury found a verdict for the defendants; and the plaintiff, feeling aggrieved by the foregoing rulings and instructions, alleged exceptions thereto.

W. L. Walker, for the plaintiff.

C. G. Ripley, for the defendants.

By the Court. The instructions were strictly correct, and well adapted to the case. *Exceptions overruled.*

OZIAS H. MATHER vs. JOSHUA BENNETT.

A. mortgaged real estate to B., to secure the payment of a promissory note for \$600, payable in three years, B. assigned the mortgage and note to C., C. afterwards assigned them to D. as collateral security for a note for \$300, payable in thirty days. C. paid D. \$25 for his loan, and, at the maturity of the note of \$300, paid D. another \$25 for a renewal of it for thirty days, and, at the expiration of that time, a further sum of \$20 for a further renewal for sixty days. At the end of the sixty days, E., to whom C. had sold his interest in the mortgage and mortgage note, in consideration of \$275 in cash and an agreement on the part of E. to discharge D.'s lien, tendered to D. \$325, and requested D. to deliver to him the mortgage and mortgage note. D. refused to do so, and E. filed a bill in equity, praying that D. might be decreed to deliver to him the mortgage and note, and to assign to E. the mortgaged premises free from all incumbrances made or suffered by D., and it was held that the court had no jurisdiction of the suit.

This was a bill in equity, filed at the November term 1849, an abstract of which is as follows:—

On the 2d day of July, 1847, Frederic Eberlee, and Elizabeth his wife, mortgaged certain real estate to Jacob Boos, to

secure the payment of a certain promissory note for the sum of \$600, with interest payable semi-annually, in three years from the above date. On the 4th of January, 1848, Boos assigned the mortgage and note to John M. Schroeder. On the 7th of January, 1848, Schroeder borrowed \$300 of Joshua Bennett, the respondent, for which he gave his promissory note for that amount, payable in thirty days, to Bennett, and assigned the above mortgage and note to Bennett, as collateral security for the payment of the note of \$300. For this loan of \$300, Schroeder paid Bennett the sum of \$25, and it was agreed that the mortgage should not be recorded unless Schroeder should fail to pay the sum of \$300 at the expiration of thirty days.

At the maturity of the note for \$300, Bennett agreed to give Schroeder the further space of thirty days, upon condition that Schroeder should pay to Bennett the further sum of \$25 for such forbearance, and Schroeder thereupon paid Bennett the further sum of \$25, and gave Bennett a new note for \$300 payable in thirty days from date, the first mentioned note for \$300 being taken up and cancelled. At the maturity of the note last given, Bennett agreed to give Schroeder the further space of sixty days, on payment of the further sum of \$20 for such forbearance, and Schroeder thereupon paid Bennett the sum of \$20, and gave him another note for \$300, payable in sixty days from date.

On the 7th day of March, 1848, Schroeder sold and assigned to the complainant all his interest in the mortgage and mortgage note, for the sum of \$600, and the plaintiff paid to Schroeder the sum of \$275, and agreed to discharge any lien which Bennett might have upon the mortgage and mortgage note, and notified Bennett of the sale and transfer to the plaintiff by Schroeder.

On the 13th day of April, 1848, Bennett caused the assignment of the mortgage made to him by Schroeder to be recorded in the registry of deeds for the county of Suffolk.

At the maturity of the note last given by Schroeder to Bennett, the complainant tendered to Bennett the sum of \$325, and requested Bennett to deliver to him the mortgage

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deed and note thereby secured, but Bennett refused to accept the same, or to deliver the deed and note to the complainant. The complainant prays that Bennett may be decreed to deliver up to him the mortgage deed and note, and to assign to him the mortgaged premises free from all incumbrances made or offered by Bennett.

General demurrer to the bill.

H. C. Hutchins, for the respondent.

A. D. Parker, for the complainant.

This case was argued and decided at a former term.

BY THE COURT. This court has no jurisdiction.

**EDWARD TUCKERMAN & others, Trustees vs. JOHN S. SLEEPER
& another.**

If a creditor applies to his debtor for payment, and he, by a written or verbal order, requests another to pay, who, whether bound to do so or not, does pay, it is a payment of the debt, and discharges the claim of the creditor.

THIS was an action of covenant brought by the plaintiffs, as trustees under the will of the late Edward Tuckerman, to recover of the defendants the sum of sixty-one dollars and sixty-six cents, being the taxes assessed by the city of Boston for the year 1848, upon certain premises on Washington street, occupied by the defendants.

At the trial, before *Bigelow*, J., in the court of common pleas, the plaintiffs, to prove their case, offered in evidence a lease from themselves to the defendants of the premises above mentioned, for the term of three years from the 1st of May, 1845, whereby the defendants covenanted that they would, during that term, and for such further time as they should hold the premises, pay unto the plaintiffs, their successors, and assigns, a certain yearly rent, and all taxes and assessments whatsoever, which might be payable for or in respect of the premises during the term, or during such further time as the defendants might hold the premises. It appeared that the defendants had occupied the premises under the lease, and

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paid the rent from May 1, 1845, until August 1, 1848, having continued in possession of the premises for three months after the expiration of the term, by agreement with the plaintiffs. It also appeared that the plaintiffs, prior to the commencement of this suit, had paid to the city the sum of sixty-one dollars and sixty-six cents, for taxes assessed on the premises for the year 1848.

The judge ruled that, under the covenant relating to taxes, the defendants were liable to pay the taxes assessed on the premises for the year 1848.

The defendants then proved that the plaintiffs made a lease of the premises to one Thomas F. Norris, for five years from the 1st of August, 1848, containing a similar covenant relating to the payment of taxes; and that Norris began to occupy the premises on the 1st of August, 1848.

Norris, being called as a witness by the defendants, testified that, about the 1st of October, 1848, a bill for two months' rent of the premises, and for sixty-one dollars and sixty-six cents for taxes, was presented to him by the plaintiffs, and that he paid the same, including the charge for taxes, to William Sohier, Esquire, who acted as agent for the plaintiffs; and that, on or about February 24, 1849, the defendants paid to Norris a bill containing the following items: "For rent of rooms from August 1, 1848, to October 1, 1848, \$58.33; for taxes on rent from May 1 to August 1, 1848, \$15.41; for taxes on rent from August 1, 1848, to October 1, 1848, \$4.50." On cross-examination, Norris testified that when the above bill was presented to him by Mr. Sohier, he objected to paying the taxes therein charged, on the ground that he was not, by the terms of the lease, liable to pay the taxes for the year 1848, but that these objections were overruled by Mr. Sohier, by whom he was told he was liable to pay the taxes for the year 1848 under his lease, and that, on reference to his lease, he came to the conclusion that he was liable for the taxes for the year 1848, and he accordingly paid the same as the taxes for the year 1848. He further testified that Mr. Sohier, at the time he paid the taxes, said something about his deriving some advantages at the end of the term, in being released

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from paying the taxes for that year, but he concluded it was doubtful whether he should realize any such advantages.

The plaintiffs then called William Sohier, Esquire, who testified that he called on the defendants for the tax for the year 1848, and they refused to pay, and, at their suggestion, he called on Norris for the payment of the tax; that he made out the bill, charging taxes sixty-one dollars and sixty-six cents, and presented it to Norris; that Norris asked if he was liable for the taxes; that he told Norris he thought he was not liable in law; that Norris said he was willing to pay taxes for the number of years he occupied, and preferred paying the first year's taxes to those of the last year of his term; that, thereupon, he agreed with Norris to take the sum of sixty-one dollars and sixty-six cents, for the taxes for the year 1853; and that Norris paid that sum, and he received it for the taxes for the year 1853.

It appeared in evidence that Sohier acted in the matter throughout as the agent of the plaintiffs, and that he was, in connection with his copartner, Mr. Lowell, the attorney of record in this case, and that the writ was made at their office. This was the substance of all the testimony in the case. The credit due to the testimony of Mr. Norris on the one hand, and Mr. Sohier on the other, was fully argued on both sides, and was submitted to the jury.

The plaintiffs asked the judge to rule, that a payment made under such circumstances would not constitute a bar to the plaintiffs' claim; but the judge instructed the jury that, if they were satisfied, by the evidence, the burden of proof being on the defendants, that the plaintiffs had demanded and received of Norris payment in full for the taxes on the premises for the year 1848 and not for 1853, and that the defendants had knowledge of this payment and assented to or ratified the same, then the plaintiffs could not recover in this action.

The jury found a verdict for the defendants, and the plaintiffs alleged exceptions.

C. W. Loring, for the plaintiffs, cited *Rev. Sts. c. 7, §§ 7, 8; Hankshaw v. Rawlings*, 1 Strange, 23; *Young v. Ruddie*, 2 Salkeld, 627; *Merriam v. Bacon*, 5 Met. 95; *Graham on New Trials*, 271.

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C. T. Russell, for the defendants, cited *Rev. Sta. c. 7*, §§ 7, 19-24; *Train v. Collins*, 2 Pick. 145; *Thompson v. Lothrop*, 21 Pick. 336; *Thorndike v. Boston*, 1 Met. 242; *Frothingham v. Haley*, 3 Mass. 68; *Lent v. Padelford*, 10 Mass. 230, 236, *Odiorne v. Maxcy*, 13 Mass. 178; *Same v. Same*, 15 Mass. 39, Story on Agency, §§ 239, 243-247; and, as to what constitutes ratification, §§ 253, 256; *Foster v. Bates*, 12 M. & W. 226; *Hull v. Pickersgill*, 1 Brod. & Bing. 282.

This case was argued and decided at a former term.

By THE COURT. The judge having ruled that the defendants were liable on their covenants, for the tax of 1848, which was in favor of the plaintiffs, the only question was, whether it had been paid by the defendants, on which question the burden of proof was on them. The bill was made out to the defendants and presented to them, and they referred the plaintiffs to Norris. They then made out the bill to Norris, and applied to him, and, after some doubt and hesitation, he paid it. That, in point of fact, it was the tax of 1848 which was thus paid by Norris, was found by the jury, and must be taken to be true. The judge instructed the jury, that if, upon such reference by the defendants to Norris, he paid it, with the knowledge and assent of the defendants, it was a discharge of the plaintiffs' demand. This, we think, was clearly right. If a creditor applies to his debtor for payment, and he, by a written or verbal order, requests another to pay it, whether bound to do so or not, and he does pay it, it is a payment of the debt, and discharges the claim of the creditor.

Exceptions overruled.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF SUFFOLK AND NANTUCKET, MARCH
TERM 1852, AT BOSTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE. HON. CHARLES A. DEWEY, HON. THERON METCALF, HON. RICHARD FLETCHER, HON. GEORGE T. BIGELOW,	}	JUSTICES.
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DANIEL WELD & others vs. SAMUEL MAY & another.

A member of a congregational church, who is elected its treasurer, to receive and invest, in his individual name, the funds of the church, and who does so invest them, holds the funds as a trustee for the church, and is subject, as such trustee, to the jurisdiction of a court of equity.

The phrase, "or other similar officers," in Rev. Sts. c. 20, § 39, means officers of similar character and with corresponding functions with those of deacons in congregational churches, and church-wardens in episcopal churches. Other officers, such as a treasurer, not of a character similar to that of deacons, can hold property of the church only as trustees.

A congregational church is neither a corporation nor a *quasi* corporation.

THIS was a bill in equity, filed by Daniel Weld, Charles F. Mayo, and John D. Weld, a committee duly appointed for this

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purpose by the Proprietors of the Meeting-house in Hollis street, in Boston, against Samuel May, of Boston, treasurer of the Hollis street church, and John Pierpont, of Medford, formerly pastor of said church. The object of the bill is to obtain a decree that certain funds belonging to said church, now invested in certain bank stocks, in the name of said May, as treasurer of the church, may not be transferred by said May to said Pierpont, but may be enjoined to be held by May in trust for the church, and for general relief. The nature of the defence sufficiently appears in the judgment of the court.

C. G. Loring and *H. H. Fuller*, for the complainants.

S. E. Sewall, for the respondents.

SHAW, C. J. The bill in this case was filed by a committee of the church, setting forth that there is a large fund, invested in the stock of two banks named, which fund has been formed and devoted to and for pious and charitable uses, to be distributed and administered according to the order and direction of said church and their members forever; that the same was created partly by voluntary donations for the purpose, and partly by contributions at the celebration of the Lord's Supper, for the benefit of the poor, &c.; that it has been invested by consent of the church, in the name of some individual member, chosen to be the treasurer, to invest in his individual name, as trustee and in trust for the said church; that the same was invested in the stock of the two banks, in the name of said May, as treasurer of said church. It avers that said May threatens to convey to said Pierpont, and said Pierpont is willing to receive the same, without consideration, contrary to right and equity; and that the complainants have requested and directed said May to desist from such payment.

It charges that the same has not been voted or authorized at any regular meeting of said church; that if any such meeting was held, it was not composed of the members of the church, but of other persons not members, and not authorized to vote, and that these proceedings are contrary to equity.

It requires answers, and prays that the stock and funds may be decreed to be invested in the name of a treasurer

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chosen by the church, from time to time, for that purpose ; or, in the name of the deacons and their successors, as a body politic, in trust for the church ; and that the said May may be restrained from transferring said stocks, and the banks from permitting such transfer, and the said Pierpont from receiving a transfer thereof ; and that the said May be ordered and enjoined to hold the same in trust for the church, or to be transferred as they may direct, and for general relief.

To this bill the respondents, May and Pierpont, have filed a plea, averring that the said May never held the said shares *as trustee*, or in trust for the Hollis street church, but that he held the same as treasurer of said Hollis street church, duly chosen as an officer thereof, in his official capacity. This has been set down by the complainants for hearing, and the question is upon the sufficiency of this plea to bar their suit.

We have no occasion here to consider the question, whether Weld, Mayo and Weld, as a committee of the church, can bring this suit in the name and behoof of the church.

In certain cases, the statute, following the earlier statute of 1785, c. 51, § 1, authorizes the commencement and prosecution of any suits, in the name of the church, against the deacons or other officers, by a committee. Rev. Sts. c. 20, § 44.

Whether the present case is within the statute, we have no occasion to consider now, because the right of the committee of the church thus to proceed is not drawn in question by this plea.

We suppose the purpose of a plea in equity is, to set forth some matter of fact, in a form capable of being put in issue and tried, which fact does not appear in the bill, the existence of which shows that the complainant has no title to recover, even though the other matters in the bill are true, as stated and set forth.

We say "not appearing" in the bill ; for if any matter of fact stated in the bill, shows that the complainant has no title to recover in equity, he states himself out of court ; the bill would be bad on demurrer, and no plea would be necessary.

The only matter stated in the plea, not appearing in the bill is, that the said May never held said shares, as trustee for

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Hollis street church, but that he held them as treasurer, as an officer, and in his official capacity.

The fact that he invested them in his own name, describing himself as treasurer of the church, is averred in the bill, and must be taken to be true, in considering the plea.

The fact relied on, then, is, that having invested the money in his own name, describing himself as treasurer of said church, and having taken certificates in the same form, he is either not chargeable at all as trustee, or not as trustee for these complainants, on the grounds stated. It is in effect, therefore, a plea to the equity jurisdiction, denying that any *trust* is set out, over which this court has equity jurisdiction or for breach of which it can afford any relief.

In order to estimate the value and sufficiency of this plea, it is necessary to consider what are the *legal character*, the rights, forms and duties of a congregational church, and the officers and persons connected with it. As these depend upon general laws, courts will take notice of them, without being specially pleaded or proved. The existence of a church being established, the consequences are attached by the law.

The character, powers and duties of churches gathered within the various congregational parishes and religious societies in this commonwealth, have been definitely known and understood from the earliest period of its existence. Indeed, the main object of the first settlers of the country, in their emigration hither, was to manage their religious affairs in their own way. The earliest thing they established was a congregation and a congregational church. The legal character of the church was well understood. It was a body of persons, members of a congregational or other religious society, established for the promotion and support of public worship, which body was set apart from the rest of the society, for peculiar religious observances, for the celebration of the Lord's Supper, and for mutual edification. They were usually formed and regulated by a covenant, or articles of agreement, which each separate church formed for itself, sometimes with the advice of other churches, by which they mutually stipulated to assist each other, by advice and counsel, in pursuing a

christian course of life, to submit to proper censure and discipline for any deviation therefrom, and, generally, to promote the essential growth and welfare of each other. They might consist of all or only a portion of the adult members of the congregation with which they were connected. The earliest statutes of the colony recognize the churches, not as corporations or even as *quasi* corporations, but each as an aggregate body of christians, in each religious society, collected together and united by covenant and by usage, and recognized by law; and these statutes provide, that their rights and usages shall be respected, and that they shall be encouraged in the exercise and maintenance of the same. Charters and General Laws of the Colony and Province of Massachusetts Bay, 100; *Baker v. Fales*, 16 Mass. 488; *Stebbins v. Jennings*, 10 Pick. 172; *Sawyer v. Baldwin*, 11 Pick. 492; *Page v. Crosby*, 24 Pick. 24.

It is naturally incident to such a body, that some expenses should be incurred by each church, such as to provide in some measure for the poor members of their own body, to procure the elements for the observance of the Lord's Supper, to pay the expenses of sending ministers and delegates to sister churches, and the like. For all these purposes, it was necessary that money should be provided and held in such a manner as to be conveniently appropriated to those charitable, or otherwise laudable, and appropriate purposes. In order, then, to accomplish this object without creating them a corporation, and to enable a church to have the control and disposal of property, the act of 1754 was passed, which has been substantially renewed from time to time, by which the deacons of each church were so far made a body politic as to take and hold, in succession, all funds that might be raised by voluntary contribution or otherwise, designed for the use of the church. The statute provisions on this subject are embodied in the revised statutes, c. 20, § 39. "The deacons, churchwardens, or other similar officers of all churches or religious societies, if citizens of the United States, shall be deemed bodies corporate, for the purpose of taking and holding, in succession, all grants and donations, whether of real or personal

estate, made either to them and their successors, or to their respective churches, or to the poor of their churches."

Now these are incidents in law to a church. If grants or donations are intended for the church, whether the gift be in form to the poor of the church or to the church itself, then the deacons are a body politic to take and hold the same. These consequences are considered as necessarily following from the fact of the existence of a church. It was so held in the case of *Sawyer v. Baldwin*, 11 Pick. 492. In that case the question was, whether a certain manuscript book, which had been kept by a deceased pastor of a church, was a private memorandum of his own, or the book of records of the church over which he presided; and if the latter, to whom it belonged. It appeared that the book was in the form of a record, that the deceased had been the proper officer of that church to keep such a record, and that no other record was kept. And the court held, that it was the book of records of the church, that the possession by the pastor, the proper officer to keep it, was evidence that it was the property of the church, and that, therefore, and by force of the statute, the legal property in the book was in the deacons of that church, and, as the right of possession follows the right of property, they might recover the possession of it.

Deacons hold *ex officiis* and not otherwise. In case of a change of the deacons by death, removal, or otherwise, those who go out cease to hold the property of the church, and those who come in become forthwith invested with the right of property, and *prima facie* with the right of possession.

In the case of *Page v. Crosby*, 24 Pick. 211, where one set of deacons was chosen, and another removed, it was held that the property of the predecessors vested at once, by law, in their successors.

But it is urged that a church may hold property to the value of two thousand dollars a year, and upon this doctrine all this property passes to the deacons by the mere force of law, and it cannot be intended that so large an amount of property shall be thus loosely dealt with. And it is asked how can a church have regular officers, and proceed at its

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meetings and in its affairs generally, in an orderly way, if it is not a corporation ?

The answer is, that although a church is an aggregate body of individuals, yet it is an institution of a public and solemn nature, generally understood ; its usages and courses of proceeding are well known, recognized, and confirmed by law ; it is perfectly open to public observation ; its objects are laudable, and the community have a deep interest in them ; and when a deacon is chosen, he is chosen according to known regulations and usage. And, therefore, whether he is duly chosen or legally removed, must always be a matter of fact, to be tried upon evidence as other matters of fact are tried. When legally chosen, the law vests in him the powers necessary to accomplish its purpose, that of taking and holding property for a known aggregate body not incorporated ; and when he legally ceases to be such deacon, by resignation or removal, he is, *ipso facto*, divested of those powers, and of the property taken under them. These points were considered in the case of *Baker v. Fales*, 16 Mass. 488. There it was held to be essential to the legal character of a church, that it be connected with some regularly constituted religious society, and that a church cannot subsist without some religious community to which it is attached. From this view it plainly follows, that the church and the society are inseparably united, and that a majority of the church, by leaving the society, cease to be members of that church, and the minority who remain constitute the church ; and that, when they removed the deacons, the deacons ceased to hold the office of deacons of that church, and thereby ceased to hold the property of the church.

The same doctrine is maintained in the case of *Stebbins v. Jennings*, 10 Pick. 172. It was argued, in that case, that a church might be deemed a corporation, or at least a *quasi* corporation, for the purpose of holding property ; but the court held, that it could be deemed neither the one nor the other. The law had provided how a church should hold property, and that was by its deacons. This, as before stated, was the doctrine also in *Sawyer v. Baldwin*, 11 Pick. 492. These

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questions were again discussed and decided as before, in the case of *Page v. Crosby*, in regard to the congregational religious society in Bedford.

To apply these principles to the case at bar, the church is neither a corporation nor a *quasi* corporation, but a body of persons associated together for certain objects under the law—an aggregate body of individuals associated together, in connection with a religious society. The term “religious society” may, with propriety, be applied in a certain sense to a church, as that of “religious association,” “religious union,” or the like; yet, in the true sense here, and as commonly used in our law, it is synonymous with “parish,” “precinct,” &c., and designates an incorporated society, created and maintained for support and maintenance of public worship. Under this head, towns were formerly included, when a town exercised all the functions both of a municipal and parochial corporation, some of which, probably, still so remain. In this, its legal sense, a church is not a religious society. It is a separate body, formed within such parish or religious society, whose rights and usages are well known, and, to a great extent, defined and established by law.

The respondent May alleges, that he was the treasurer of the church in Hollis street, and, in taking and investing these funds, acted in his official capacity as such treasurer; and that, therefore, the relation of trustee and *cestui que trust* does not exist as between himself and the church. But in strictness, the deacons are the trustees of the property of the church; the legal estate and interest is vested in them, and any one who has the possession or administration of it, must be deemed to have it by their express or implied authority, by whatever title he may be called. The church, by electing a person as a “treasurer,” which implies that he is to be the keeper of their money, may, by necessary implication, have shown their consent, and perhaps their wish, that their money might be placed in his custody, and it would be a good justification to the deacons in not keeping possession of it, according to their *prima facie* right. But this is the extent of such

implied authority ; it does not go to the disposition, appropriation, or investment.

Such, then, is the relation subsisting between the church and Mr. May, their treasurer ; he has a good authority to take and hold their money, to their use, subject to be appropriated and disposed of as they should from time to time direct. Under these circumstances, the court are of opinion, that the relation of trustee and *cestui que trust* did subsist between these parties.

The plea assumes that, because he is a treasurer, therefore he cannot be deemed a trustee ; but it appears to us that this is a *non sequitur*, and that, in certain cases, he may be both a treasurer and trustee, and a trustee because he is a treasurer. Whether a treasurer be a trustee or not, appears to us to depend on the question, what body or society he is chosen treasurer of. He may be chosen treasurer of a county, town, parish, or corporation, where his duties and his accountability are prescribed by law ; it may be justly held, that he is not a trustee for the individuals of such county, town, parish, or corporation, though interested in the proper administration of the funds ; nor could they maintain a suit in equity against him, because he is not accountable to them, and is not a trustee for them.

But suppose a few persons assemble and form a voluntary society, to raise money to be appropriated to some specific object, and they choose one of their number to be their treasurer ; the meaning of the word "treasurer" would imply that he holds their funds for their use, to be appropriated according to their order. Would he not be a trustee for them, and accountable to them, and liable to a suit in their own names, either at law or in equity, according as the one or the other should be the appropriate remedy ? The difference between that and the present case is, that, although neither is a corporation, yet a church is an aggregate body, so far vested with legal powers that they may sue by a committee, and are not bound to sue in the names of all the members.

From this view it follows, that, when one is chosen treas-

urer, but when such office is not established by law, so that its character, duties, and responsibilities are not created and defined by law, we must seek in the general law, to ascertain what are his rights and powers, his duties and responsibilities, and the remedies which others may have against him. If these make him a trustee, then he may be chargeable as trustee, though chosen a treasurer.

We have already stated that, until the deacons claim the funds, the treasurer holds them for the use of the church. Suppose any person should give or send money or other property to the treasurer of the church, would he not hold it as trustee?

It was strongly urged, in the argument, that the case of *Hale v. Cushman*, 6 Met. 425, was a decisive authority against this suit. But it seems very clear that there was no relation of trustee and *cestui que trust* in that case. It was a suit brought by some sixty or seventy of the inhabitants of Bernardston against the treasurer of the town and a majority of the selectmen, to restrain them from paying over money, under a vote of the town, for the defence of an action brought against the said selectmen by a voter whose vote they had refused at an election. And it was held, that the treasurer of the town was not a trustee for the individual complainants, but for the town in its corporate capacity, with duties and rights as such treasurer, defined and regulated by law. Jurisdiction was there denied, because no trust was set forth in which the complainants had an interest, and for a violation of which they could sue in equity.

Looking at the church in this case as a body of individuals, they do not hold property to their own use, but their deacons are invested with powers to supply such deficiency in the legal constitution of a church.

It is not necessary to decide, in this case, whether a bill in equity would lie in a proper case, against the deacons of a church. Their duties are, to some extent, defined by law; but, in case they violate their duties, we are not prepared to say that a bill in equity would not lie against them; as if, for example, they failed to apply the funds of the church as their

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duty demanded of them. The statute provision, that a committee of their church might sue them, was made before equity jurisdiction was given to this court; still, that statute was made to enlarge and extend remedies, for violation of rights which before existed. But here, though we know that Mr. May, the defendant, is called Deacon May, yet he does not say, in his plea, that he claims to hold the funds in question as deacon, but he says he held the funds invested as treasurer. Still, as his office of treasurer is one not expressly created by law, but a mere agency, that mode of investment can only be deemed an intimation that he held the property not in his own right, but in that of others.

But it is argued that the phrase in the revised statutes, c. 20, § 39, which is found also in the statute of 1754, and in that of 1785, c. 51, "or other similar officers," is meant to include treasurers. But we think this a misconstruction. It means officers in churches otherwise constituted, of similar character and with corresponding functions with those of deacons in congregational churches, and churchwardens of episcopal churches. It was intended for the benefit of the methodists, the baptists, the christians, or any of the other sects, in order that their officers, under whatever name, who exercised functions corresponding to those of deacons and churchwardens, might take and hold property for their respective churches. Other officers, not of a character similar to that of deacons, must hold simply as trustees. Therefore, when Mr. May says he invested the stocks in the name of Samuel May, as treasurer, it means that he held himself out to the world, not as the beneficial owner of the funds invested, but as one holding for others. And if he held them under the name of a "treasurer," "keeper," or "receiver," or other similar designation, he was still to be deemed a trustee for others. The plea here is not a plea of any new, distinct, and substantive facts; but simply that he is a treasurer and not a trustee; it depends on all the uncontroverted facts stated in the bill. But if, taking those facts together, he is a treasurer and a trustee at the same time, as we think he is, this ground of defence fails. The plea is therefore overruled.

FRANCIS C. GRAY vs. WILLIAM E. COFFIN & others, Assignees.
THE SAME vs. THE BOSTON IRON COMPANY.
THE SAME, in Equity, vs. THE BOSTON IRON COMPANY & others

The assignees of an insolvent debtor, a portion of whose assets consists of shares in a manufacturing corporation, are not liable, either at law or for contribution in equity, to a creditor of the corporation, himself a member, under any of the statutes of this commonwealth, which render members of such a corporation personally liable for its debts; although the assignees attended meetings of the corporation and acted as stockholders.

The personal liability of members of a corporation, in certain cases, for the corporate debts, depends solely on provisions of positive law, which are to be construed strictly.

The provisions of St. 1838, c. 98, apply to all corporations, whether created before or after the passage of the act. The term "trustees," in that act, does not embrace "assignees" chosen under the insolvent law, St. 1838, c. 163, subsequently enacted.

A suit in equity for contribution, brought by a member of a corporation, who has paid a debt of the corporation, against other members, cannot be maintained until the complainant has first applied and exhausted all property of the corporation bound to reimburse him.

THESE suits came before this court on an agreed statement of facts, which sufficiently appear in the opinion of the court.

The first is an action of assumpsit, brought by the plaintiff against Coffin and his associates, in their capacity as assignees of the insolvent estate of Horace Gray & Co., to charge the assets in their hands with the payment of the sums due from the Boston Iron Company to the plaintiff. The declaration alleges that the defendants were, in their capacity as assignees, members and stockholders of the corporation, at the time when the corporation, by reason of the plaintiff's payments for its use and benefit, and on its account, became indebted to the plaintiff for the amounts so paid, and that the assets in the defendants hands were more than sufficient to pay him; that these sums were, at the date of the writ, still due from the corporation to the plaintiff, but that the corporation was unable and had refused to pay them; that, by reason of these facts, the estates and funds in the hands of the defendants are by

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law liable to pay the same to the plaintiff, and that it is, therefore, the duty of the defendants to pay him, but though requested, they have refused, &c.

The second is an action of *assumpsit*, brought by the plaintiff against the corporation, to recover judgment for the sums of money due from it to the plaintiff, on account of the payments above stated.

The third of the above-named suits is a bill in equity, filed by the complainant as a creditor of the corporation, in which the corporation and the individual stockholders are respectively made respondents, including Coffin and his associates, as proprietors of the eighty-four and a half shares formerly owned by Horace Gray & Co., the complainant describing himself as the proprietor of eighty shares. The bill sets forth the facts above stated, and, if the complainant has not a right, as he contends he has, to claim the whole amount paid by him from any stockholder, or from the corporation, a right which he does not waive by bringing his bill, at least he contends that, under his bill, he has a good claim for contribution against all the stockholders, in the proportion of the number of shares which they hold to the whole number of shares of the capital stock. The prayer of the bill is for an account, for a decree for contribution against the individual respondents, and for further relief.

If the court shall be of opinion that the first action, against Coffin and his associates, and the assets in their hands, can be sustained upon the facts agreed, judgment is to be rendered for such amount as the court shall direct; otherwise, the plaintiff is to become nonsuit in said action; unless the court shall be of opinion that Coffin and his associates are personally liable to the plaintiff for the debts due to him from the corporation, in which case the writ and declaration in the first action are to be amended accordingly, and the plaintiff is to take judgment in accordance with such amendment.

If the court shall be of opinion that Coffin and his associates are not liable to the plaintiff, either personally or officially, nor that the assets in their hands are liable for the debts due to him from the corporation, such judgment is to

be rendered in favor of the plaintiff in the second action, as the law requires; and in case the court are of opinion that the plaintiff has no remedy against Coffin and his associates, under the first action, the plaintiff submits that he is entitled to the relief sought in his bill in equity.

The plaintiff has not offered to prove any claim against the estate of Horace Gray & Co., founded upon the premises, before the master in chancery.

S. Bartlett and G. T. Curtis, for the plaintiff.

The statutes which apply to this corporation are *St.* 1808, c. 65, § 6; *St.* 1817, c. 183; and *St.* 1821, c. 38, which made members directly liable. The subsequent acts of 1826, c. 137, and 1829, c. 53, are applicable only to such corporations as may adopt them, which this corporation has not done.

A member who has a debt against a corporation has the rights and remedies of other creditors. *Peirce v. Partridge*, 3 Met. 44, 48; *Revere v. Boston Copper Co.* 15 Pick. 351.

Hooper, Bullard, and Coffin are members of this corporation. *Overseers of the Poor of Boston v. Sears*, 22 Pick. 122, 130; *In re Long Island R. Co.* 19 Wend. 37; *Ex parte Holmes*, 5 Cowen, 426; *Ex parte Barker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cowen, 402; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243; *Sargent v. Essex Marine Railway*, 9 Pick. 202; *Chester Glass Company v. Dewey*, 16 Mass. 94; *Eames v. Wheeler*, 19 Pick. 442; *Gilbert v. Manchester Iron Manufacturing Co.* 11 Wend. 627; *Quiner v. Marblehead Insurance Co.* 10 Mass. 476; *Sargent v. Franklin Insurance Co.* 8 Pick. 90; Insolvent Act of 1838, c. 163, §§ 5, 11. See also the proxies under which one of the defendants has acted at meetings of the corporation, above recited.

Assignees in bankruptcy may make themselves liable to the burdens imposed on the estate which comes to their hands. *Copeland v. Stephens*, 1 B. & Ald. 593; *Welch v. Myers*, 4 Campb. 368; *Thomas v. Pemberton*, 7 Taunt. 206; *Clark v. Hume*, 1 Ry. & Mo. 207; *Page v. Godden*, 2 Starkie R. 309; *Hanson v. Stevenson*, 1 B. & Ald. 303; *Gibson v. Courthope*, 1 D. & R. 205; *Carter v. Warne*, 4 C. & P. 191; *Turner v. Richardson*, 7 East, 335; *Hastings v. Wilson*, F. L.

Holt, 290; *South Staffordshire Railway v. Burnside*, 2 Eng. Law & Eq. R. 418.

The liabilities of the members of this corporation, under the act of 1821, are full and direct, without any distinction as to the capacity in which the member holds his stock. These liabilities have not been modified by subsequent legislation; or, if they have been modified, the trust estates of members who hold as trustees are left liable to creditors. *St.* 1826, c. 137, §§ 4, 5; *Kelton v. Phillips*, 3 Met. 61.

If the defendants, Hooper, Coffin, and Bullard, are not liable, personally or officially, under the act of 1821, their trust estates are liable under Rev. Sts. c. 38, § 34. An analysis of this chapter will show that this section applies to all manufacturing corporations, and *St.* 1838, c. 98, § 1, makes this clear.

If the defendants, Hooper, Coffin, and Bullard, are not liable under the act of 1821, or under Rev. Sts. c. 38, § 34, to pay the plaintiff his whole debt, they and all the other stockholders are liable in equity to a contribution. The remedy in equity is given by Rev. Sts. c. 44, § 22. The liability to contribute depends upon the broad principle of equity, that, where a common burden is discharged by one, all are bound to contribute. *Cheesebrough v. Millard*, 1 Johns. Ch. R. 409; *Stevens v. Cooper*, Ibid. 425; *Campbell v. Mesier*, 4 Johns. Ch. R. 334; *Dering v. The Earl of Winchelsea*, 1 Cox, 318; S. C. 2 Bos. & Pull. 270; *Craythorne v. Swinburne*, 14 Ves. 160; *Kemp v. Finden*, 12 M. & W. 421; 1 Story's Eq. Juris. §§ 492, 496.

C. G. Loring and *F. C. Loring*, for the assignees.

1. These defendants are not members of the corporation for the debts of which they are sought to be charged, within the meaning of the acts imposing an individual liability; because their interest as assignees does not make them such, and because the shares owned by the insolvent have never been transferred to them, and they do not appear to be shareholders on the books of the company. *Dodgson v. Bell*, 3 Eng. Law & Eq. R. 542; *Weald of Kent Canal Cor. v. Robinson*, 5 Taunt. 801; *Copeland v. Stephens*, 1 B. & Ald. 593;

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2. If members, they are not under any personal liability to pay debts or contribute towards payment, because they hold, if at all, as trustees. *St.* 1827, c. 137, § 4.

3. The suit at law cannot be maintained, the plaintiff and defendants being both shareholders. *Andrews v. Callender*, 13 Pick. 484; *St.* 1829, c. 53, § 11; *Harris v. First Parish in Dorchester*, 23 Pick. 112; *Bailey v. Baucker*, 3 Hill, 188; *Brigden v. Cheever*, 10 Mass. 450; *Stedman v. Eveleth*, 6 Met. 114. Nor is a member liable to a suit at law by a creditor. *St.* 1808, c. 65; *St.* 1817, c. 183; *St.* 1821, c. 38; *St.* 1826, c. 137; *St.* 1829, c. 53; Rev. Sts. c. 38; *Stone v. Wiggin*, 5 Met. 316; *Knowlton v. Ackley*, 8 Cush. 93; Rev. Sts. c. 36, § 11.

J. Dana, for the defendants in the last named suit, except Coffin, Hooper, and Bullard.

SHAW, C. J. The first named suit is an action of assumpsit, brought against Coffin, Hooper, and Bullard, assignees of Horace Gray & Company, insolvent debtors. These proceedings in insolvency were commenced upon the application of Horace Gray and Company, on the 24th of November, 1847. The first publication of notice took place on the 25th; and, on the 7th of December following, the defendants were appointed assignees, and a regular assignment was executed to them by the master.

Amongst the assets of the insolvents, were eighty-five shares in the capital stock of the Boston Iron Company, estimated, at par, at \$1,000 a share, making \$85,000.

This was a manufacturing corporation, established by an act passed on the 13th of June, 1822, and held its first meeting on the 27th of December, 1826. This corporation was declared to be invested with the powers and subject to the duties of the general act, *St.* 1808, c. 65, and the several acts in addition thereto. The additional acts then in force were *St.* 1817, c. 183, passed February 24, 1818, and *St.* 1821, c. 38, passed January 28, 1822. These were the three acts to which the Boston Iron Company was expressly made subject.

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The action is brought against these assignees, as members and stockholders, having become so by acceptance of the assignment, and by reason of the personal liability of members and stockholders of manufacturing corporations, by some of the laws of Massachusetts, for debts due from such manufacturing corporations. The plaintiff insists that, notwithstanding he is himself a member and stockholder in the same corporation, yet he may contract with them, and become a creditor to them, in the same manner as any other person might do; and, therefore, having become a creditor to the corporation, after the defendants, in their capacity as assignees, had thus become individual members and stockholders, he may maintain an action against them, on such statute liability.

The debt alleged to have accrued to the plaintiff against the corporation may be briefly stated. At the time of the failure and insolvency of Horace Gray & Company, in November, 1847, they held, as above stated, about eighty-five shares in the stock of the Boston Iron Company, consisting of two hundred shares; that Francis C. Gray, the plaintiff, held also about eighty-five shares, leaving about thirty shares distributable among a few other persons. Horace Gray & Company had long been the general agents of the Boston Iron Company, and, upon the failure of these agents, the affairs of the company were exceedingly perplexed. They owed a very large amount of debts, and had on hand a large stock of materials, and means for carrying on their business, and had unexecuted contracts to a large amount, for the supply of iron rails, and other work. In December, 1847, the corporation made a mortgage to Francis C. Gray, the plaintiff, of a great part of their works and materials. Early in January, 1848, the corporation, with the consent of the plaintiff, made a general transfer of all their property to William Appleton & Company, with full powers to them, as agents, to purchase and sell and carry on the business; the plaintiff entered into a stipulation with Appleton & Company to guarantee all that should become due from them to Appleton & Company, and to indemnify them against all their engagements, on

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behalf of the company, under the unlimited agency thus created. Before the end of the year, Messrs. Appleton & Company rendered their account of debts paid, property sold, and money received, making a balance of about \$47,000 due from the company to Appleton, which, pursuant to his guaranty, the plaintiff paid to Appleton, with the knowledge and at the request of the company, and thereby the plaintiff became the creditor of the corporation to this amount.

He claims to be a creditor for another sum of about \$9,000, paid by the plaintiff for the use and benefit of the corporation. In an account stated and annexed, there appears to be a sum debited to the plaintiff, to meet this last claim, of about \$11,000, which would overbalance his last claim by about \$2,000. But the amount is not material; it is rather the character and date of the debt which is now in question. It appears that this sum consisted of the payment of two notes, made by the corporation and indorsed by the plaintiff as an accommodation indorser, dated March 1, 1848, payable in one year, and paid by the plaintiff at maturity. In one clause in the report it is stated, that these notes, given some months after the failure and assignment of Horace Gray & Company, were in renewal of notes given before their insolvency, for the same amounts. It is obvious that the term "renewal" does not mean another note by the same parties, continuing a former note of the like tenor; because it is stated, immediately after, that the plaintiff was not indorser of such former notes. The renewed notes, thus for the first time indorsed by the plaintiff, were so indorsed by the special request of the treasurer, and were subsequently paid by the plaintiff, by the like special request.

From this view of the debt due from the corporation to the plaintiff, it is manifest, not only that it accrued as a debt long after the insolvency, but that the undertaking of the plaintiff in behalf of the company, which was the origin and cause of such indebtedness, commenced after the assignment. The bulk of the claim was a debt paid to the said Appleton & Company, at the special instance and request of the corporation; and the debt due to William Appleton & Company thus paid,

originated in transactions which commenced after the insolvency and assignment.

It is very clear that no such liability to an action exists at common law; and the question is, whether it can be established by force of any or all of the numerous statutes of this commonwealth, applicable exclusively to manufacturing corporations. To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute.

The claim of the plaintiff, in the present case, proceeds on the ground that, as the Boston Iron Company was incorporated on the 13th of June, 1822, it was governed by the provisions of *St.* 1808, *c.* 65, *St.* 1817, *c.* 183, and *St.* 1821, *c.* 138, being those to which it was expressly made subject; and, as the subsequent acts affected only corporations subsequently established, or corporations previously established which might subsequently adopt them, which this corporation did not, it depends wholly upon the statutes in force when it was incorporated. If it stood upon the *Rev. Sts. c.* 38 alone, there might be some plausibility in this argument. That chapter is limited to the rights and duties of manufacturing corporations and their members. The basis of that chapter was the next previous general statute on the subject, *St.* 1829, *c.* 53, passed February 23, 1830; it adopts and reenacts nearly all the provisions in the act, and is made applicable to all corporations to be established afterwards; to all which had been established since February 23, 1830; and all which had been before established, which should vote to accept its provisions, and proceed to conform to the provisions of § 27, for certifying, recording, and publishing a statement of their capital, debts, and assets.

By the statute following that of 1829, it is provided, § 34, that no persons holding stock in any manufacturing company, as executors, administrators, guardians, or trustees, shall be personally liable, &c. The argument is, that this only applies to the corporations therein referred to, incorporated after February 23, 1830, or adopting the provisions of this chapter; although there is a provision, § 36, that all manufacturing corporations now existing shall continue to enjoy, &c., and subject, &c., according to their charters and the laws then in force, except so far as said powers, privileges, and liabilities shall be modified and controlled by the provisions of this chapter. It would seem, therefore, that it was intended not merely to reenact existing provisions, but to make some further provisions; and, as the provision of § 34, respecting stock held by trustees, is general in its nature, there is good ground to believe, especially as an analogous provision, when first introduced in *St.* 1826, was manifestly intended as a declaratory act, declaring that former acts should not be construed to render trustees, &c., personally liable, that this was intended to be general, and extend to all corporations.

But we are relieved from the necessity of considering the subject of the construction of this act more particularly, by the subsequent legislative act, *St.* 1838, c. 98, passed April 10. 1838. This act was general in its nature, extended to members of all corporations, providing to what extent they should be liable to the claims of creditors, and all persons dealing with and becoming creditors of any corporation. It was future and prospective in its operation, regulating the rights of debtor and creditor, as they should afterwards arise, expressly securing any right acquired by any person against a holder of stock in any corporation, by force of existing laws. It had no tendency to impair, or in any way affect or inodify, any power, privilege, or immunity, pertaining to the franchise of any corporation, and, therefore, seems to be within the just limits of legislative power. This act passed many years before the supposed liability of these defendants is alleged to have accrued, and we are therefore of opinion that it governs the present case.

By this act, it is provided that no persons holding stock in any corporation, as executors, administrators, guardians, or trustees, shall be personally subject to any liabilities, as stockholders of such corporation; but the estates and funds in their hands shall be liable, in like manner and to the same extent, as the deceased testator or intestate, or the ward, or person interested in such trust fund would have been, if they had respectively been living and competent to act, and held the same in their own names.

The question arises upon the construction of this statute, of which there has been very little judicial consideration. The case of *Stedman v. Eveleth*, 6 Met. 114, was somewhat peculiar. It was the case of a trustee, who held a trust fund for the purpose of investment and income, perfectly solvent, who held shares in a manufacturing corporation, which had not complied with the provisions of the law, to exempt the individual members from personal liability. The officer had seized and sold stock in another corporation, part of the same trust fund, and the trustee brought trespass against the sheriff. All objection to the course of proceeding and form of action was expressly waived, and the only question submitted to the court was, whether the fund was liable, in the hands of the trustee, and the court held that it was. Whether the course of proceeding, to enforce such a claim, should be by action or by bill in equity; what would be the case had the fund been insufficient to satisfy all legal claims upon it, was not at all considered in that case.

Similar and greater difficulties might arise in applying these provisions to the case of an executor or administrator. The effect of the statute would seem to charge the estate of the deceased with a liability not higher in its nature than a debt. If the estate were solvent, perhaps an action would lie, in which the creditor might have a judgment *de bonis testatoris*, so as to charge the assets. But in case of insolvency, such charge having no preference over other debts, entitled to be paid *pari passu*, it would seem inconsistent with the rule of equity, and with the established rule in regard to estates of deceased insolvents, to permit such creditor to have a judg-

ment against the executor *de bonis propriis*, which would require him to pay in full if the estate was not sufficient, because all other creditors have an equally valid claim to full satisfaction. It would seem to be more conformable to general rules governing the settlement of estates, that a person holding such a claim, made a charge on the estate by operation of law, should either go before the commissioners and offer his claim for proof; but if not within their power, because not strictly a debt, then to file his bill in equity. But, in either of these courses of proceeding, seeking equity he must do equity, and, to that end, he must first apply all the funds in his hands, under his own control, all mortgaged property and other collateral security specially liable, and prove only for the deficiency. *Amory v. Francis*, 16 Mass. 308. So, if the claimant himself was liable to contribute to the same fund, an account must be taken, and all legal and equitable matters of set-off would be deducted. *McDonald v. Webster*, 2 Mass. 498; *Bordman v. Smith*, 4 Pick. 212.

In case of a guardian, where the shares of a manufacturing corporation are held as an investment, and for purposes of income, and where the ward has other property, and is not insolvent, an action, perhaps, would be sustained; but the statute must be construed according to the subject-matter, and as the subjects to which it is applicable are various, it may have a different application to the different subjects embraced in it.

But it may not be necessary or useful to pursue this inquiry further, because the views we have taken of the liability of these defendants, as assignees of an insolvent estate, render it unnecessary.

We are not disposed to deny that assignees under the insolvent laws, are, to many purposes, trustees. They are officers of the law, whose powers and duties are prescribed, limited, and regulated by law; still, they hold a fiduciary relation and character, like executors, administrators and guardians, who are also trustees. We have no disposition to doubt that they would be chargeable as trustees, under the equity jurisdiction of this court. But this does not decide this question; it is necessary

to look more carefully to the provisions of law constituting that trust and regulating its execution.

Assignees are officers of the law, in the nature of receivers, appointed to collect and distribute the effects of an estate, which has already come to a close,—a civil death,—and requires only the time necessary to wind it up.

The statute in question, charging funds in the hands of a trustee, was passed April 10, 1838, to go into operation immediately. The general insolvent law, under which the defendants were appointed assignees, was passed April 23, 1838, to go into operation the 1st of August following. So far as the enactments of the latter act are inconsistent or conflicting with those of the former, those of the former are, to that extent, modified or repealed. Whether the general term "trustees," would have included this peculiar class of officers, had the insolvent law preceded, might have been a more difficult, perhaps a different question; because, as already stated, when the statute of 1838, charging funds in the hands of trustees, was enacted, there was no provision for appointing such a class of officers as assignees under an insolvent law; if there had been, the general phraseology might have been so modified as to exclude assignees. As it is, the rule I have stated applies; the last expression of the legislative will constitutes the law, and if it is repugnant to any former provision, it repeals it.

The insolvent law is full and explicit, as to the claims against the estate of the insolvent. *St.* 1838, *c.* 163. The proof of debts is limited to debts due at the time of the first publication of notice; debts due but not then payable; debts then created but due on a contingency, if the contingency happen before dividend; suretyship, taken for the debts before, although the same may not ripen into a debt until after, and paid after; such debt is considered as contracted when the suretyship was assumed, and not when paid by the surety; and these strong negative words are added, "and no debt other than those above mentioned shall be proved or allowed against the estate assigned as aforesaid." The plaintiff's claim is neither within the letter nor the equity of this provis-

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ion. It was not only a debt, if debt at all, which accrued after the assignment; but the contract and dealings of the plaintiff with the corporation, out of which it is supposed to have grown, commenced after the assignment.

The assignment vests all the property and all the debts due the insolvent, in the assignee, and dissolves all attachment on it. It authorizes the assignee to redeem all property, subject to any pledges or *liens*. The debtor's shares vest in the assignees; if they are subject to any *lien* for assessments or other charges, the assignees may redeem them, if it is for the interest of the estate, but they are not obliged to do so. *Andrews v. Callender*, 13 Pick. 484.

All preferences are prohibited, and equal distribution amongst all creditors, after the application and deduction of all collateral securities and counter claims, is provided for by the insolvent law, and everywhere insisted on, as being of the spirit of the system. A very few privileged debts only are admitted, such as debts due the government, and a very small amount as wages due to actual laborers. Dividends are to be made to all creditors who have proved, in proportion to their debts. By § 25, all laws inconsistent with these provisions are repealed, leaving rights actually accrued under them.

But, supposing that there is any error or mistake in the true construction of the statutes, on which the foregoing conclusion is founded, and that the legislature never intended that either the act of 1829, nor the revised statutes, in regard to persons holding shares, should apply to manufacturing corporations, neither chartered after its passage, nor accepting and adopting its provisions; still, the court are of opinion that the result would be the same.

The argument is, that as each successive corporation was created, it was made subject to the acts then in force, and that corporations created previously were not affected, nor were intended to be affected, by the acts passed afterwards. It is conceded that the iron company was chartered in 1822, and has never since adopted and accepted the provisions of the subsequent acts, according to their terms and requisitions, so as, by force of such adoption, to bring itself under their

operation. The result would be, that this corporation, and its members, must be governed by the acts of 1808, of 1817, and 1821.

In taking this view, we assume that the next succeeding act, *St.* 1826, c. 137, although in terms a declaratory act, limiting the liability of individual members, does not apply to it; and probably we are right in so assuming, because it was after in time, and because there was a provision that it should extend to corporations previously established, if they should adopt it by vote, and give a prescribed notice, which they never did. But if it could be held to apply, it would be decisive against the liability. It declared that the previous statutes should not be so construed as to render personally liable persons holding stock as executors, administrators, guardians, or trustees, nor any persons holding such stock as collateral security. It does further proceed to provide, that the funds in their hands should be liable. That provision was first introduced into the more general act of 1829, c. 53, which prescribed an entire new system, regulating the accountability of individual members, both the principle and conditions on which it should depend, and the modes of carrying it into effect. The question, therefore, still recurs, what would be the title of the plaintiff to maintain his action, by force of the first three acts.

By the *St.* of 1808, no liability as for a debt was charged on the stockholder; the provision was, that an execution recovered against the corporation might be levied on the individual member. *Leland v. Marsh*, 16 Mass. 389; *Marcy v. Clark*, 17 Mass. 330.

This construction was uniform, it created a new right, and gave a precise and specific remedy, which must be strictly pursued, and it was held to create no charge upon the estate of a deceased member. *Ripley v. Sampson*, 10 Pick. 371.

The statute of 1817 went no further in regard to the nature of this liability, but provided that the liability, such as it was, should extend to those who were members when the debt accrued.

The ground of the argument is, that *St.* 1821, c. 38, went
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further and imposed the liability on the stockholders, as a debt, for which the common law affords a remedy by action. It is very short, and enacts that every person who shall become a member, &c., shall be liable in his individual capacity for all debts contracted during the time of his continuing a member.

Supposing this the true construction, the argument is, that the statute declares the stockholder to be a debtor; being placed under an obligation to pay the debt of the corporation, that the common law gives a remedy by action of debt, or *indebitatus assumpsit*, and that all the consequences of this relation and obligation created by law follow.

Assuming this to be so, the argument in behalf of the plaintiff is, that a member of the corporation may as well be a creditor of the corporation as any other, and may have an action, recover judgment, and levy execution. *Peirce v. Partridge*, 3 Met. 44.

And it is further argued that, because he may be the creditor, and have a judgment against the corporation, he may also, like any other creditor, have the collateral remedy over upon any individual member, as provided for by this statute. But this is by no means a just conclusion. The obligation is declared by this statute, but the remedy, as the case supposes, is sought at the common law; it must, therefore, be limited and controlled by the rules of the common law. Now, if the member, who has become a creditor of the corporation, say A., could recover against B., another member, B., by paying the debt, would, in his turn, become a creditor of the corporation, and might have his action against any one or all the other members, and amongst the rest, against A., to recover the money back again. Now when a case is so situated that, if one can recover against another, and the latter can turn round and recover the money back, the law, by way of rebutter, and to avoid circuity of action, holds such liability a defence to the first action. Supposing, by way of illustration, that there be a note in circulation, with a promisor and several indorsers, of whom A. is the first, and B. the second; it is indorsed by several others, and subsequently, in the course of business,

comes again to A., as indorsee, after these other indorsements. As such indorsee, A. sues B. as his prior indorser, which any other indorser might do. B. answers that, though true it is, he is liable to pay it to A., as indorsee, yet he would have an immediate action over against A., as his prior indorser, and this shall be a good defence by way of rebutter.

It is no answer to say, that, by subsequent acts, a member who has been compelled to pay the debt of the corporation, has a remedy in equity, by contribution, against other members. The case we are now supposing excludes all these subsequent acts, and rests solely on the principles of the common law, acting upon the liability declared by the statute of 1821. Looking at the facts, it appears that, when the debt to the plaintiff became due from the corporation, and ever since, Mr. Gray has been, and still is, an individual member of the same corporation; that if he could recover against the defendants, upon *St.* 1821, they, in turn, would become creditors of the corporation, and might bring their action and recover the same amount against him, the court are of opinion that this would be a good bar to this action.

The court are of opinion that it adds nothing to the legal claim of the plaintiff, that the assignees attended meetings of the stockholders after the assignment, and voted as stockholders. The assignment undoubtedly divested the original right of Horace Gray and company, and the legal interest and property in the shares vested in the assignees. But this leaves the question entirely open, what liabilities they came under, especially to another stockholder. Whatever valuable interest there was in the shares they held for the creditors. We think, therefore, that they were bound to attend to the interest of the creditors, and to attend meetings, if such interest required it.

This might be, and to all appearance was, a valuable property. This depended altogether upon the question, whether there would be a surplus to divide amongst the shareholders, after paying all its debts.

If the corporation has enough to pay all its debts, the plaintiff can lose nothing, because the whole capital of the company

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is bound by law for his debt; and, in addition, he holds a mortgage upon all their property for his reimbursement. The assignees had a right to look after this interest, and obtain a surplus, if practicable, and their attendance at meetings for that purpose, did not subject them, or the property in their hands, to any liability that did not exist without it.

The property was vested in them by assignment, and their interest was in the surplus, and they might continue to act until it should appear that there was no surplus.

The opinion here given, we think, disposes of the bill in equity, so far, at least, as Coffin, Hooper, and Bullard, as assignees of Horace Gray and company are concerned. It proceeds on the ground that the complainant became a creditor of the corporation; that the respondents equally with himself, became liable for the debts of the corporation, in their individual capacity to pay, and therefore, upon principles of equity, he claims a contribution. As to the assignees, he avers that they became liable as such assignees, and have other funds of the same trust, sufficient to meet their contributory share to his debt.

The complainant is here met by the objections hereinbefore stated, against the right of the complainant to proceed at all in equity, for a contribution, until he has entirely applied and exhausted the property of the corporation bound to reimburse him, but more especially the property specially mortgaged to him as collateral security for the advances which constitute his demand on the corporation, which objection lies to the whole bill, as it now stands. But, in addition, it proceeds upon the assumption, so far as it seeks to charge Coffin, Bullard and Hooper, as assignees, that they are liable, as debtors to the estate, in common with himself and others, and the contribution is sought on that ground. Having decided that they are not so liable to an action, that decision is equally conclusive, so far as they are concerned, against the claims made by the bill. In these two cases therefore, judgment will be for the defendants. In the suit at law against the corporation, judgment for the plaintiff, according to the agreed statement of facts.

Judgment accordingly.

ELBRIDGE BROWN vs. GEORGE D. DUTTON & others.

A debtor of the defendants and also of the plaintiff gave the plaintiff a chattel mortgage to secure both debts. The plaintiff afterwards authorized the defendants to take possession of the mortgaged property, and convert it into money, for their joint benefit. On the same day the defendants covenanted with the plaintiff "to pay him \$1,000, to his sole use as soon as the cash should be realized from the sale and disposition of the mortgaged property." The defendants then sold most of the mortgaged property, partly for cash, and partly for notes, all which they kept. They also retained the balance of the property which was unsold, except a portion which was redelivered to the mortgagor and he was discharged. The plaintiff brought his action upon the covenant to pay him the \$1,000 before that sum had been actually received by the defendants; held, that the action could not be maintained.

THIS was an action of covenant broken, commenced on the 15th of August, 1849, against George D. Dutton, Ormond Dutton, George C. Richardson, and Charles W. Pierce, composing the firm of Dutton, Richardson & Co.; and Augustus Brown and Joseph Dix, composing the firm of Augustus Brown & Co., upon their joint and several covenant, reciting that "whereas Augustus L. Welles has made to Elbridge Brown a certain chattel mortgage for the purposes therein expressed, and whereas the said Elbridge Brown has consented to take possession and dispose of the said mortgaged property, and for that purpose hath appointed the said Augustus Brown and George C. Richardson, jointly and severally, his lawful attorneys: now these presents witness, that in consideration of the premises, and of ten dollars to us paid, we, the said Dutton, Richardson & Co., and Augustus Brown & Co., do hereby, jointly and severally, covenant and agree with the said Elbridge Brown, and his assigns, as follows, viz: that the said firm of Dutton, Richardson & Co., so soon as the cash shall be realized by the sale and disposition of the said mortgaged property, shall pay to the said Elbridge Brown the sum of five hundred dollars to his sole use; that the said firm of Augustus Brown & Co., so soon as the cash shall be realized by the sale and disposition of the said mortgaged property, shall pay to the said Elbridge Brown the further sum of five hundred dollars to his sole use."

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The plaintiff alleged, in his declaration, "that the cash has been realized by the sale and disposition of said mortgaged property, in the manner contemplated by the said deed; yet that neither the said firm of Dutton, Richardson and company, nor the said firm of Augustus Brown and company, nor any of the persons composing either of those firms, have or hath paid either of the said several sums of five hundred dollars, so as aforesaid to be paid to the said plaintiff, or any part thereof, but wholly neglect and refuse so to do, though thereto requested since the cash was realized, as aforesaid; nor have the said defendants, or either of them, paid the same to the plaintiff, since the neglect and refusal of the said firms so to do; and so the plaintiff says that the said defendants their covenants aforesaid have not kept, but have broken the same."

Augustus Brown and Joseph Dix were defaulted. The other defendants pleaded the general issue.

At the trial before *Bigelow*, J., in this court, it appeared that Augustus L. Welles of Detroit, on the 21st of March, 1848, mortgaged personal property to the plaintiff, to secure payment of \$10,973, in equal instalments of three, six, and nine months. Eleven hundred and fifty dollars of this sum were due to the plaintiff; \$4,043.65 were due to Augustus Brown & Co.; \$4,779.35 to Dutton, Richardson & Co.; and \$1,000 to Bramhall, Fairbanks & Co. The condition of the mortgage was thus: "In case default shall be made in the payment of said sums, or any part thereof, at the times above limited, or in case the said Brown," (the plaintiff,) "who herein represents the interests of Augustus Brown & Co., and Dutton, Richardson & Co., as well as his own, or, in case of his decease, Augustus Brown & Co. shall deem it for the interest of all concerned, then it shall be lawful for the said Brown, (the plaintiff,) his executors, administrators, or assigns, or his or their authorized agents, to enter upon the premises of the said Welles, or any place or places where said goods or chattels, or any part of them, may be, and take possession thereof, and sell and dispose of the same, at the best prices which can be obtained therefor, at private sale or public auc-

tion, as he may deem meet and best, and out of the money arising therefrom to pay and retain the said sum of money above mentioned, and all charges of said sale, (if so much there shall be,) rendering the surplus moneys, if any, to said Augustus L. Welles."

It also appeared that, on the 5th of April, 1848, the plaintiff (mortgagee) gave a power of attorney to Augustus Brown and George C. Richardson, one of them being a member of the firm of Augustus Brown & Co., and the other of the firm of Dutton, Richardson & Co., (whose debts, as well as that of the plaintiff and that of Bramhall, Fairbanks & Co., the mortgage was given to secure,) authorizing them, in his name and behalf, to take possession, manage and dispose of, and convert into money, the property mortgaged as before stated, and the proceeds to distribute and divide, to and among the several persons mentioned and provided for in the mortgage, at their risk and expense, without any charge for personal services. The plaintiff also, in the power of attorney, authorized his attorneys to substitute one or more attorneys under them. And they afterwards substituted Joseph F. Dickinson.

It further appeared, that on the same day on which the power of attorney was made to Augustus Brown and George C. Richardson, the individual members of the two firms of Augustus Brown & Co., and of Dutton, Richardson & Co., executed the instrument, above set forth, and on which this action was brought.

It also appeared from the testimony of Joseph F. Dickinson, the substituted attorney, that he went to Detroit, in April, 1848, and took possession of the property mortgaged by Welles to the plaintiff, and sold most of it to Lyon, Farnsworth & Co. and others, partly for cash and partly for their notes, payable at different times; the last of the notes being payable in November, 1849. That he gave up to Welles the residue of the property, worth from \$1,000 to \$1,200, and discharged the mortgage; that the amount of the proceeds of the property, which he disposed of, was \$9,795.76, of which between \$3,000 and \$4,000 he paid in expenses and in discharge of

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prior mortgages on the same property ; that on the 3d of July, 1848, he delivered to Dutton, Richardson & Co. notes taken for the property so sold by him, (which notes were secured by mortgage,) to the amount of \$3,575.48, and goods, part of the mortgaged property which was not sold, worth \$325 ; and to Augustus Brown & Co. notes, taken for goods sold, to the amount of \$2,899.56.

It did not appear that either or all of the defendants had received \$1,000 in cash, from the sale and disposition of the mortgaged property, before the commencement of this action. Six or seven hundred dollars only were shown to have been so received ; although it was in evidence that, at the time of the trial, much more than \$1,000, in cash, had been so received by the defendants.

The case was taken from the jury, by consent of the parties, with an agreement that if the whole court should be of opinion that the plaintiff, on the foregoing evidence, is entitled to recover, the four defendants, who pleaded to issue, should be defaulted ; otherwise, that the plaintiff should become nonsuit so far as relates to those defendants.

A. H. Fiske, for the plaintiff.

W. Brigham, for the defendants.

METCALF, J. This is an action on a joint and several covenant made by the individual members of two firms. A debtor of these firms, who owed one of them \$4,779.35, and the other \$4,043.65, and who also owed the plaintiff \$1,150, gave the plaintiff a mortgage of personal property to secure these several debts. Before breach of the condition of this mortgage, the plaintiff, at the instance of the defendants, empowered them to take possession of the mortgaged property, and convert it into money. The defendants, thereupon, covenanted with him, that as soon as the cash should be realized by the sale and disposition of the mortgaged property, each of said firms should pay him five hundred dollars, to his sole use. For an alleged breach of this covenant, the members of these two firms are now sued jointly.

We incline to the opinion, that the plaintiff is right in his construction of this covenant to wit, that the words, "as

soon as *the cash* shall be realized," mean, not the whole proceeds of the mortgaged property, but the cash which the defendants covenanted to pay to the plaintiff; and that the true interpretation of the covenant is, that as soon as \$1,000 are realized in cash, from the sale and disposition of the mortgaged property, each of said firms shall pay \$500 to the plaintiff.

The plaintiff then takes this position: "That the defendants, in point of law, have received, in cash, \$1,000, or what is equivalent to money." And he relies on the cases in which actions for money had and received, and for money paid, have been maintained, where one has received the amount of another's debt, or has satisfied another's debt, in money's worth, instead of money itself. But these are cases in which a defendant's liability is imposed by law, or principles of equity, without reference to any special contract of the parties. Thus a party, whose duty it is to receive money, on the sale of another's property, but who receives notes or goods, is held liable to the claimant in an action for money had and received; being estopped to deny that he has received the money. So a surety, whose land is set off on execution to satisfy the debt of the principal, is entitled to indemnity; and as his land has satisfied that debt, the principal is held liable to him in an action for money paid. And so of many similar cases. The present action, however, is brought on a special contract, in which the defendants covenanted to pay the plaintiff \$1,000, "so soon as the cash" should "be realized from the sale and disposition" of certain property. Notes on time, taken for the property sold, are not cash, within the meaning of this covenant. Still less is the mortgaged property itself, part of which the defendants took, to be deemed cash. And there was an obvious reason why the defendants should desire, and the plaintiff consent, that payment to the plaintiff should be deferred, till the cash should be realized. The property was at Detroit, and was to be sold. And sales to any considerable amount are generally on a credit, longer or shorter. The parties evidently had reference to these facts; and the defend-

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ants did not mean to advance money to the plaintiff, but to pay him from the cash receipts of the sale.

It was suggested for the plaintiff, in the argument, that the defendants may be considered as having received the cash, and to have invested it in the notes which they took ; or that, as Welles, the mortgagor, has been discharged from the plaintiff's claims, by the defendants, they may be charged as for money had and received. But the court cannot adopt either of these suggestions.

There are cases, in which defendants have been charged in actions for money had and received, when they have received notes for another's dues or property, and nothing further appears after a considerable lapse of time beyond that at which the notes were made payable. The legal presumption is, in such cases, in the absence of proof to the contrary, that the defendants have collected the notes. But in this case there is no such presumption.

If the defendants had so managed the matter, as never to have received any cash for the mortgaged property ; if they had given it all up to the mortgagor, for the purpose of evading their contract with the plaintiff ; he might doubtless have a remedy against them, of some kind. And so, if they have discharged his claims against the mortgagor, as the plaintiff, in argument, alleges that they have, they may be liable to him for that act ; but not on this covenant to pay him when the cash should be realized from the sale.

As the defendants had not received \$1,000 in cash, when this action was commenced, the action cannot be maintained.

The agreement of the parties at the trial was, that if the court should be of the opinion now announced, the plaintiff should be nonsuit, so far as relates to the defendants, who have appeared and pleaded. But the counsel for the plaintiff will consider whether, as the writ and declaration now are, he can safely take judgment as against the defendants who have been defaulted. *Tuttle v. Cooper*, 10 Pick. 281 ; Rev. Sts. c. 100, §§ 6, 7.

Plaintiff nonsuit.

GEORGE ADAMS vs. WILLIAM R. CLARK & others.

The consignee of goods, who is ready to pay freight on having the goods delivered to him, may maintain trover against the carriers or their agents, who, having no legal claim on the goods for any thing besides the freight, refuse to deliver them, unless a further sum is first paid; the consignee, in such a case, is not bound to make any tender to those in possession of the goods, and their refusal to deliver the goods is evidence of a conversion.

THIS was an action of trover, brought to recover the value of nineteen and one third barrels of clam bait, alleged to have been converted by the defendants to their own use. It was tried in the court of common pleas before *Mellen, J.*, who signed the following bill of exceptions:—

“ It appeared in evidence that the clam bait was shipped by Thomas Donaldson, from Halifax to Boston, in the schooner *Boston*, consigned to the plaintiff. On the arrival of the vessel in Boston, the bait was put in charge of the defendants, agents for the owners of the vessel, with instructions not to deliver the same till the freight and the passage of Mr. Donaldson, who came in the same vessel, was paid; it being alleged that it was agreed at Halifax, that the passage of Mr. Donaldson, the father of the consignor, should be paid from the proceeds of the bait.

Several questions arose in the course of the trial; but it was unnecessary to report any, except such as relate to an alleged tender, made by the plaintiff to the defendants, of the freight and wharfage of the bait.

The plaintiff contended that he did certain acts, previous to bringing this action, which amounted to a tender to the defendants of their whole freight and wharfage of the bait and of their whole claim, except ten dollars, the passage of Mr. Donaldson. He further also admitted that, unless he had made a tender, he could not maintain this action.

The defendants admitted certain acts to have been done by the plaintiff on two several occasions, to wit, on the 22d and 29th days of June, 1848, as alleged by the plaintiff, but they denied that they amounted to a tender.

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Upon the evidence bearing upon the question of tender, the court instructed the jury, first, that, in order to constitute a tender, the plaintiff must have offered the defendants the money unconditionally, so that it could have been received by the defendants, if they wished to take it, unless they waived, by their declaration or act, such production of the money; second, that, if the defendants were ready and willing to receive the money offered, but declined to give up the property till a larger sum was paid, and thereupon the plaintiff refused to leave his money, but went away, taking his money with him, saying he would see about it, such an act would not constitute a tender; third, that the defendants' asking a larger sum than the amount tendered would not, of itself, amount to a waiver of the production of the money."

The jury found a verdict for the defendants, and the plaintiff excepted.

F. W. Sawyer, for the plaintiff.

W. Brigham, for the defendants, cited *Thayer v. Brackett*, 12 Mass. 450; *Loring v. Cooke*, 3 Pick. 48; *Breed v. Hurd*, 6 Pick. 356; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42; 3 Stephens's Nisi Prius, 2602.

METCALF, J. As the exceptions state that the plaintiff, at the trial, admitted (what is not law) that unless he had made a tender, he could not maintain this action, he seems to have lost his case chiefly by his own fault or mistake; and we have had some doubts whether he is entitled to relief. But, inasmuch as the exceptions, though defectively drawn up, show that the trial proceeded upon an erroneous view of the law, we have deemed it our duty to set aside the verdict.

If the defendants illegally withheld the goods from the plaintiff, he might have brought an action of assumpsit against them, as well as this action of trover. And, in that action, all that it would have been necessary for him to aver and prove would have been his readiness to pay the freight, upon delivery of the goods. 2 Saund. 352, note (3); *Porter v. Rose*, 12 Johns. 209; *Tinney v. Ashley*, 15 Pick. 546. And we are of opinion that all which it was necessary for the plaintiff to prove, in order to maintain this action, was his

readiness to pay freight on the goods, upon their being delivered to him, and the defendants' refusal to deliver them unless something more should be first paid. There was no special contract, so far as these exceptions show, respecting the payment of freight, nor any agreement, between the consignor and the carriers, that the goods should be held to secure payment for the passage of a third party. The payment of the freight and the delivery of the goods were, therefore, concomitant acts, which neither party was obliged to perform, unless the other was ready to perform the correlative act. *Tate v. Meek*, 2 Moore, 278, and 8 Taunt. 280; *Yates v. Railston*, 2 Moore, 294, and 8 Taunt. 293; 3 Chit. Law of Com. and Man. 417; Angell on Carriers, § 384.

It is said by Chancellor Kent, that if the master of a vessel refuses to deliver goods for other cause than the non-payment of freight, he cannot avail himself of the want of a tender. 3 Kent Com. (7th ed.) 281. The same law must apply to the owners of a vessel and to their agents.

In the present case, the defendants refused to deliver the goods, unless the plaintiff would pay, in addition to the freight, for the passage of the consignor's father, who came in the vessel that brought the goods. And a refusal to give up property, except on a condition which the party holding it has no right to impose, is evidence of a conversion. *Davies v. Vernon*, 6 Adolph. & Ellis, N. S. 443.

On a new trial, the jury should be instructed, that if the plaintiff was ready to pay freight, upon having the goods delivered to him, and the defendants, having no legal claim on the goods for any thing besides the freight, refused to deliver them unless a further sum should be first paid, then the plaintiff was not bound to make any tender to the defendants, and their refusal to deliver the goods was evidence of a conversion of them.

Verdict set aside, and a new trial granted.

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CHARLES G. BARKER & another vs. WILLIAM E. P. HASKELL.

Books of account, the entries in which were copied by one plaintiff from entries on a slate made by the other plaintiff, verified by the oath of both plaintiffs, are admissible in evidence.

Account books are not incompetent, as of course, because the entries therein were not made on the same day that the charges were incurred.

In an action for work and materials, the plaintiff's books are admissible to prove work done by persons in his employment.

Whether a defendant, who, during the pendency of a suit against him, institutes proceedings in insolvency, shall have a delay of the trial of the action on that ground, and for how long a time, are matters resting entirely in the discretion of the judge before whom the action is pending; and to the exercise of such discretion no exception lies.

A creditor may prosecute an action against his debtor to final judgment, notwithstanding, after the action is commenced, the defendant institutes proceedings in insolvency, and the creditor offers the claim in suit for proof against the estate.

THIS was an action of assumpsit for work and materials.

At the trial, in the court of common pleas, the plaintiffs' books constituted their only evidence, except as to the value of day labor. It was stated that the entries were originally made on a slate by one plaintiff, and subsequently copied into the daybook by the other, and the suppletory oath of both plaintiffs was offered in verification. The defendant objected to this evidence, but the presiding judge, *Hoar, J.*, admitted it.

It also appeared that the entries were made upon a slate, each day, at the shop, by one of the plaintiffs, and, when there were several of the plaintiffs' men at work on the same day as in this case, the entry was for so many days' work on that day. This slate was taken by the other plaintiff to his house, and the entries copied therefrom into the daybook. It appeared that this was usually done every day, but, as regards these charges, the plaintiff who did the copying could not say but that several days might have elapsed before the entries on the slate were copied by him, but that he was confident, in this case, that they were copied every day, as their work was pressing at that time of year, and the slate filled every day. It also appeared that the plaintiff who made the entries on the slate did not examine the books, to see that the charges

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were made or copied correctly. The defendant objected to the admissibility or competency of the books under this evidence, but the judge admitted them, and ruled that they furnished a *prima facie* case for the plaintiffs, except as to one item for plasterers' work.

The defendant was in insolvency before J. M. Williams, Esq., having filed his petition after the commencement of this action.

The defendant showed to the court that, at the third meeting of his creditors, on the 12th of June, 1849, the plaintiffs presented the claim in suit for proof and allowance, and made oath to the same, but that, objection being made to it, the further consideration thereof was postponed by the commissioner to the fourth meeting, thereafter to be called: that the fourth meeting was ordered to be called for the 2d of August, 1850; and that the defendant had, six months before, requested that the fourth meeting might be called, but that the clerk not finding the assignee, it had been deferred. The defendant offered to show that his estate had paid in full all demands proved against it, and that there was now, in the hands of the assignee, a sum sufficient to pay the plaintiffs' whole claim, if proved; that that was the only claim then pending, and that the defendant was entitled to his discharge; but the judge refused to hear the evidence. It appeared that the defendant had, at that time, made no application for his discharge, and that none had been granted.

On this evidence, the defendant contended that the court ought not to try the case, and had no jurisdiction to try it, as against the defendant, the plaintiffs having submitted their case to the jurisdiction of the commissioner of insolvency. But the judge refused so to rule, and the case was brought into this court on the defendant's exceptions.

A. B. Ely, for the defendant.

The plaintiffs' books were not admissible or competent, because better evidence of the facts, or of a part of them, was to be had, and because the entries were not seasonably made. 1 Greenl. on Ev. §§ 117, 118, and notes, and authorities there cited, particularly *Forsythe v. Norcross*, 5 Watts, 432; *Waltes*

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v. *Bollman*, 8 Watts, 544; *Lynch v. Petrie*, 1 Nott & McCord, 130; *Hughes v. Hampton*, 2 Const. R. (S. C.) 745; *Wright v. Sharp*, 1 Browne, (Pa.) 344.

The court ought not, then, to have proceeded to trial or judgment in the case, but should have postponed or continued it, till the matters then pending before the commissioner of insolvency had been passed upon, and the defendant's discharge granted or denied; (1) because the plaintiffs had themselves submitted the very claim in suit to the jurisdiction of the commissioner; (2) because the defendant was in no fault in not having received his discharge; (3) because the rule has invariably been that, where the defendant was not in fault, cases should be continued during the pendency of proceedings in insolvency, to allow the defendant to obtain and file his discharge. *Ex parte Foster*, 2 Story's R. 131.

S. C. Maine, for the plaintiffs.

The books were properly admitted. *Vosburgh v. Thayer*, 12 Johns. 461; *Faxon v. Hollis*, 13 Mass. 427; *Smith v. Sanford*, 12 Pick. 139; *Morris v. Briggs*, 3 Cush. 342.

The delay of the defendant in procuring his discharge was unreasonable, and the plaintiffs had a right to ask for a trial. The court had full jurisdiction to try the action, so long as the plaintiffs' claim had not been proved and allowed by the commissioner. *Morse v. Reed*, 13 Met. 62; *Morris v. Briggs*, 3 Cush. 342.

BIGELOW, J. The objections made to the admissibility of the book of the plaintiffs as evidence, have been substantially overruled by former decisions of this court.

1. The first objection, that the entries were originally entered on a slate by one of the plaintiffs, and thence copied on to the daybook by the other plaintiff, was overruled in *Faxon v. Hollis*, 13 Mass. 427, and *Smith v. Sanford*, 12 Pick. 139. Being verified by the oath of both the plaintiffs, they were clearly competent.

2. The next objection is, that the entries were not seasonably made on the book. The evidence, as reported, fails to sustain this objection; the fair inference being, that they were copied from the slate daily. But if it were not so, it by no

means follows that the books would be inadmissible to prove the charges. Although the rule is well settled, that the entries, to be competent, must have been made at or near the time the charges were incurred, it does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. *Morris v. Briggs*, 3 Cush. 342. In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort, much must be left to the judgment and discretion of the judge who presides at the trial; because, having the books before him, and understanding all the circumstances of the case, he is better able to decide upon all questions involving the fairness and regularity of the entries sought to be proved.

3. The remaining objection to the plaintiffs' books is, that there was better evidence in existence of the charges; because, the subject matter of them being for work done by the day, by persons in the employment of the plaintiffs, the testimony of such persons would be the best evidence of such charges. This objection was distinctly overruled in *Mathes v. Robinson*, 8 Met. 269, and we see no occasion for revising that decision.

4. The remaining exceptions alleged by the defendant are of a different character. At the trial, he offered to prove that, after the commencement of this action, he had filed his petition for the benefit of the insolvent acts; that the proceedings therein were still pending, and that, for various reasons, he had not obtained his discharge, to which he was in fact entitled, as soon as application therefor was duly made by him; and upon these facts, he contended that the court ought not to proceed with the trial of the cause, but were bound to grant him a continuance. We know of no rule of law, by which a defendant, who has applied for the benefit of the insolvent laws, can claim, as a matter of right, the delay of the trial of an action pending against him, at the time of the

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institution of proceedings in insolvency. In many cases of disputed claims and uncertain amounts, it is expedient and necessary that a trial should be had, in order to enable a party to present his claims for proof. It is, undoubtedly, the universal practice of the courts in this commonwealth, upon the suggestion of the insolvency of a defendant, in an action pending before them, to grant a continuance of the case for a reasonable time, in order to give the defendant a proper opportunity to procure and plead his discharge in bar of the plaintiff's claim. Ordinarily, and unless the defendant were guilty of laches in procuring his discharge, continuances would be granted, until, by the due and regular course of proceedings, the discharge is granted or refused. But whether such continuances shall be granted, and for how long a time, must be left to the discretion of the court where the suit is pending, and cannot be claimed as of right. To the exercise of such discretion no exception lies ; and, therefore, the refusal of the court to grant a continuance in the present case cannot be revised here.

The defendant also contended, that the court has no jurisdiction to try the case, because the plaintiffs had offered their claim for proof against the estate of the defendant in insolvency, and, it having been objected to, and its consideration postponed to the fourth meeting, it could not be further litigated before the court. As no reason was given or authorities cited, in support of this position, by the counsel for the defendant, it is difficult to understand the precise grounds on which it rests. The proof of a claim against the estate of an insolvent is a collateral proceeding, wholly independent of and aside from an action pending in court, and having an entirely distinct and different object. It is the only mode in which the creditor can reach his share of the assets in the hands of the assignee, and, so far, it gives him a partial remedy. But the suit at law may still continue, to complete the remedy. If the defendant fails to procure his discharge, or, when obtained, if it is liable to be impeached and set aside for fraud, or other causes, the creditor may, in such cases, continue to prosecute his action to final judgment. The case

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of *Morse v. Reed*, 13 Met. 62, is in point, and goes further than is contended for by the plaintiff in this case. There, creditors who had proved their claims and received a dividend from the estate of the insolvent, were allowed to prosecute their suit, commenced before the proceedings in insolvency to final judgment. *Exceptions overruled.*

SOLOMON HOLMES vs. MADISON BEAL.

It is not essential to the validity of an executor's sale of his testator's real estate for the payment of debts and legacies, under a license from the probate court that he first obtain the appointment of guardians to all minors who are interested in the estate.

One who has been in possession of real estate, under an executor's sale, for more than five years, the period of limitation established by Rev. Sts. c. 71, § 37, is not obliged, in an action to recover such real estate, to establish the validity of the executor's sale, before he can avail himself of the statutory bar.

THIS was a writ of entry to recover a parcel of real estate, situated at the corner of Centre and Southac streets, in Boston. The writ was dated July 8, 1850. The tenant pleaded the general issue, with a suggestion of improvements made by him more than six years prior to the date of the writ, and also relied on the statute of limitations.

The action was tried in this court before *Bigelow*, J., and reported by him for the consideration of the whole court.

To prove his case the demandant offered the following documentary evidence, namely : —

1. A deed bearing date April 30, 1829, from John Low and others to George B. Holmes, the brother of the demandant, conveying the demanded premises.

2. The will of George B. Holmes, bearing date September 2, 1829, and duly proved and allowed, September 14, 1829, whereby the demandant and his brothers and sisters were

made residuary devisees of the estate of the testator, of which the demanded premises formed a part. George Putnam and James Burr were appointed executors of the will.

The demandant then offered evidence to show that George B. Holmes, the testator, died seised of the demanded premises in 1829; that Solomon Holmes, the demandant, Elizabeth Holmes, Rosanna Holmes, Israel Holmes, Samuel Holmes, and William Holmes, were the brothers and sisters of the testator at the time of his death; that all of them, except Elizabeth, were minors at the time of the testator's death; that the demandant was then ten or eleven years of age; that Samuel and William were younger than the demandant; that their father died before the death of the testator; that the demandant and the other children, who were minors, had no guardians legally appointed at any time; that two of his brothers, named as devisees, namely, Samuel and William, had died before suit brought. Samuel died fourteen and William five years before suit brought.

It further appeared that no person was in possession of the demanded premises after the death of the testator, until the sale thereof by the executors of the will, as hereinafter stated.

The tenant then offered in defence the following documentary evidence, namely:—

1. Letters of executorship, dated September 14, 1829, to George Putnam and James Burr, as executors of the will of George B. Holmes, from the probate court for Suffolk county.
2. A list of debts due from the estate of Holmes, amounting to \$534.88, presented to the probate court April 26, 1830, subscribed, and sworn to by the executors.
3. A petition, presented May 10, 1830, to the judge of probate, by the executors, for leave to sell real estate sufficient to pay debts, &c., with the order thereon.
4. A letter of license to the executors to sell so much real estate as will raise the sum of \$416.63, and \$60 for incidental charges, bearing date June 14, 1830, the executors to give notice of time and place of sale by posting, or publication, three weeks successively, in the Daily Commercial Gazette,

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published in Boston, first taking the oath by law required, &c., but requiring no bonds.

5. A deed from the executors to Alexander Townsend, dated July 10, 1830, duly acknowledged and recorded, conveying the demanded premises, reciting that they were sold at public auction, and covenanting that the executors were duly qualified, and had taken on themselves the trust, and had full authority to execute and pass the deed; that Holmes's estate was solvent; and that the premises were free from all incumbrances from Holmes, the executors, or either of them.

6. A deed from Alexander Townsend to Madison Beal, dated June 29, 1831, duly acknowledged and recorded, conveying the demanded premises.

Two objections to the validity of the sale by the executors to Townsend were relied upon by the demandant. 1. That some of the residuary devisees under the will of George B. Holmes, were minors at the time of the sale, to whom no guardian was appointed. 2. That the proper oath was not taken, nor the proper notice of the sale given by the executors. But the evidence on these points became immaterial to the decision of the case.

It was admitted that the demandant had resided in this commonwealth for five years after attaining his majority, and after his title, if any, to the premises had accrued; and that he was then about thirty-three years of age.

On the foregoing facts, the judge instructed the jury to return a verdict for the tenant.

If the court shall be of opinion that any of the foregoing evidence was wrongly admitted, and that, excluding such evidence, the demandant is not barred by the statute of limitations from claiming title to any portion of the premises, but has a legal title to any part thereof, the verdict is to be set aside and a new trial granted, or such other order is to be passed by the court as they shall think proper; otherwise judgment is to be rendered for the tenant on the verdict.

L. Gale, for the demandant.

W. Minot, Jr., for the tenant.

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DEWEY, J. The several parties all claim title through George B Holmes, who, it is conceded, died lawfully seised of the premises.

The demandant is one of the residuary devisees under the will of said George B. Holmes, and, as such, claims a portion of the estate, and the residue as heir of two of his co-devisees, who have deceased.

The tenant claims under a title derived through a sale by the executors of Holmes, under a license from the probate court to sell real estate to pay debts and legacies. The sale and conveyance by the executors was to one Alexander Townsend, in the year 1830, who conveyed the same to the defendant. The question between the parties is as to the validity of the title through the executors. The deed, it is admitted, is proper in form and passes the title, if the executors had the authority to make the sale, and complied with the requisites of the statute regulating such sales. The demandant alleges that no legal authority to make the sale was conferred on the executors, by reason of the fact that, among the residuary devisees of the will, were certain minors, to whom no guardians were appointed.

This objection was not much pressed, and is not well founded. The practice in the probate court, in cases of applications of this nature by the executor, is to order notice in the manner prescribed by the statute, and it is not made the duty of the executor to obtain the appointment of guardians to all minors who may be interested in the estate, before he can obtain a license to sell the same for the payment of debts and legacies.

The proceedings in the probate court in such cases are not like those required in ordinary suits at law against a minor, himself, where the plaintiff must, at his peril, see that the party has a guardian *ad litem*, or other proper legal representative.

The principal objection to the validity of the executors' sale is of a different character, namely, that the proper oath was not taken, nor proper notice of sale given by the executors.

To this the tenant sets up, in answer, that these grounds are

not open to the demandant, the case falling within the provisions of Rev. Sts. c. 71, § 37, limiting the commencement of actions for the recovery of real estate sold by an executor or administrator, under a license of the court of probate, to five years next after the sale.

It was contended by the demandant, that this limitation of suit to five years, applies only to estates "sold" by an administrator, and, therefore, necessarily requires the tenant to establish a valid sale, before he can avail himself of this statute. But this construction would render the provision in § 37 wholly nugatory. In other cases, and in all cases, no more could be required than to establish a valid sale and conveyance by the executor, by those who would defeat the estate of an heir or devisee of the same. If an action were instituted within the five years, the sale must be duly established, and, upon the demandant's view of the statute, if the party instituted his action after five years, no less a burden rests upon those claiming under an executor's sale.

This provision of the statute was intended to quiet titles, and is highly proper and reasonable for the protection of those holding under this species of title.

We have no doubt but that the case falls within it, and the tenant may avail himself of the limitation of five years, as a bar to the objections proposed to be taken to the sale, the case further showing that such period of five years had elapsed after the removal of all disabilities, and the parties having shown residence in the commonwealth as required by the statute.

The defence being well maintained upon this ground, no occasion exists for considering particularly the other question, argued much at length, that of the competency of one executor as a witness in the case, and how far his conveyance with warranty to Townsend would show him incompetent. Upon this point we express no opinion. Upon the other ground, as already stated, the defence is well maintained.

Judgment for the tenant.

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BERNARD S. TREANOR vs. PATRICK DONAHOE.

This court will not set aside a verdict on the ground of excessive damages, unless it evinces a mistake in principle, or the influence of partiality or prejudice.

THIS was an action on the case for a libel, published on the 5th day of July, 1850, in a newspaper called the "Boston Pilot," of which the defendant was publisher and proprietor. The trial was in this court, before *Bigelow, J.*, who reported the case to the full court.

The defendant pleaded the general issue, and also the truth of the statements contained in the article, the contents of which do not seem material to the present case.

The presiding judge gave full and explicit instructions on the question of damages, to which no exceptions were taken by the defendant. The jury returned a verdict for the plaintiff, and assessed damages in the sum of eighteen hundred dollars.

The defendant thereupon filed his motion to set aside the verdict, and grant him a new trial, on the ground of excessive damages.

J. Egan, for the defendant.

B. F. Hallett, for the plaintiff.

SHAW, C. J. This was an action on the case for a libel, published on the 5th day of July, 1850, in a newspaper called the "Boston Pilot," of which the defendant was publisher and proprietor.

It appeared in evidence, that a meeting was held in Emigrant Hall, so called, in Congress square, in Boston, on the 27th day of June, 1850, by the friends of Thomas Darcy McGee, for the purpose of assisting him to establish a newspaper in Boston, at which meeting the plaintiff was present, and offered resolutions, and made a speech in favor of the object. Soon after this meeting, the publication charged as libellous appeared. It is a ludicrous report of the proceedings of the meeting, and the appearance and remarks of the plaintiff. The article was not written by the defendant, nor was he present at the meeting. It was written by one Wilson, who

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was called as a witness. The evidence also shows that the plaintiff was the secretary of the "Journeyman Tailors' Association," and was employed by that society as their manager, salesman, and book-keeper, at a salary of nine dollars a week. He had espoused the cause of the members of the society in a *strike*, which was organized here soon after his arrival in this country. He had been here about two years, at the time of the alleged libel. Soon after leaving the journeymen tailors' employment, he established a clothing store, called "The Beehive, or Sempstresses' Coöperative Society," the basis of which was an association of females, who became shareholders on paying an entrance fee of five dollars each, and so obtained the right to receive, at the end of each year, a share in three fourths of the profits of the society, in proportion to their interest, and to receive pay for their work at improved prices. The gravamen of the libel was, that the plaintiff was therein alleged to have been "kicked out" of the journeymen tailors' association, and to have deceived the members of the Beehive society by false pretences.

The defendant undertook in his specification of defence, and offered evidence at the trial to show, that the charges in the libel were true, but failed to do so. Under our statute, such an attempt to prove the truth of the allegations, and the filing of such a plea, are no grounds for increasing the damages, and the law was so laid down by the court; but if the jury see, in such proceedings, any proof of a continued desire on the part of the defendant to injure the plaintiff, and are in some degree influenced thereby, the court have no power to prevent the consequences of such impressions upon their minds. The jury, in this case, found a verdict against the defendant, and assessed damages at \$1,800, upon which he moves that the verdict be set aside and a new trial granted on the ground that these damages are excessive.

This court have often had occasion to remark upon the difficulty of setting aside a verdict on the ground of excessive damages in the case of libel and slander, and the analogous cases of malicious prosecution, criminal conversation, seduction, and the like. They are analogous in this, that, in

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general, they do not involve a loss of money, time, or business, capable of being measured and estimated, but are founded on damages done to one's feelings, reputation, social position, hope of advancement, and the like. These are damages not measurable by any standard, but capable, in many instances, of producing the severest suffering, yet, in others, cause little or no actual injury. Each case depends so much on its own circumstances, that no standard can be laid down, or general rule fixed. Courts everywhere assert the power, and yet, for the causes stated, seldom exercise it. *Duberley v. Gunning*, 4 T. R. 621; *Hewlett v. Cruchley*, 5 Taunt. 276.

Sometimes it has been said, that, although the court has full power to set aside the verdict in this class of cases, they will not do it, unless the damages are enormous, outrageous, or entirely disproportionate. But these intensive epithets afford very little aid in forming a standard, or arriving at any general and practical rule. For the question still recurs, on the facts in each case, what is "enormous" or "outrageous;" and this depends on the nature and aggravation of each case, to be determined by all the circumstances.

Something like a general rule was laid down, in regard to the duty of the court in setting aside verdicts, when there is evidence on both sides, in *Baker v. Briggs*, 8 Pick. 122; in which it is said that, "our law and constitution having given the ultimate decision upon the facts to the jury, to set aside their verdict, unless in extraordinary cases, when it is manifest that they have mistaken or abused their trust, will be to usurp a power which has been lawfully and properly withheld from us." This has the appearance of a definite rule, but, when analyzed and reduced to its elements, it amounts to little more than saying, that the court will not set aside the verdict, unless they are quite satisfied that it is wrong. For what is the trust of the jury? Clearly, to render a just and true verdict. But if the verdict is clearly wrong, this may have happened because the jury may have acted on an erroneous view of the law or of the fact, and then it is a mistake; or, they may have been actuated by bad motives, partiality, corruption or party influence, or personal or sec-

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tional prejudice, and this is an abuse of their trust. The fact that the verdict appears to the court to be wrong, is taken as proof that the jury have mistaken or abused their trust. See, also, *Sargent v. —*, 5 Cowen, 106.

The damages in this case are certainly very large, much larger, we are free to say, than we should have given, and it was highly proper that the case should be brought before the court on the evidence. Then the question is, are the damages excessive, that is, so beyond all reasonable limits, as to make it the duty of the court to set aside the verdict, and submit the case to another jury? The considerations herein stated suggest one obvious and practicable admonition to the court, which is, that because there is no standard by which to measure the damages, the court will be slow to pronounce a verdict excessive, and will not set aside a verdict on that ground, unless it is for a sum beyond any reasonable amount, which any just view of the evidence which might have been taken by the jury, would warrant men of ordinary intelligence in awarding.

In looking at the libel in this case, though to some extent contemptuous, holding the plaintiff up to ridicule, there seems to be nothing likely to be seriously or permanently injurious to his interests, or his social position. It bears rather the character of a lampoon and a pasquinade, than a serious charge of criminality. But yet there are aspects, in which it may be regarded as considerably injurious to one situated like the plaintiff, comparatively a stranger, dependent upon the good will and good opinion of his countrymen. It plainly intimates that he had been ignominiously expelled from a society of journeymen tailors, who had placed confidence in him; the proof of which fact, though attempted at the trial, wholly failed.

The distinct statement was made, that, under a pretence of gratuitous and patriotic efforts to aid the cause of the journeymen tailors, with whom he had professed to feel a common interest and sympathy, he had done this from selfish and mercenary motives, and demanded money for these services at nine dollars per week. The proof of this also failed; it

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being proved that he had received this wholly as pay for actual services, as salesman and book-keeper, in their establishment.

The libel also stated that the plaintiff was attempting to make money by imposing upon women, the seamstresses, by falsely pretending to aid them.

The position of the defendant also shows, that he might have been induced to attack the plaintiff, because he was exerting some influence in attempting to establish a rival newspaper to that of defendant, amongst the foreigners and catholics of this country.

The libel consisted of a pretended report of the doings of a meeting of Irishmen, called to aid and promote the establishment of a rival paper; and the obvious purpose was, to defeat such design, by ridiculing the promoters of it.

We cannot say that a jury might not consider this attempt to ridicule and vilify the plaintiff, with a view to destroy his influence with his countrymen, as emanating from mercenary motives, as having a very injurious influence upon the character and prospects of the plaintiff.

Repeating the remark, that we should have been much more satisfied with a lower assessment of damages, and should have fixed a lower rate had we been in the place of the jury, yet we cannot perceive in the verdict such mistake in principle, or the influence of such partiality or prejudice, as would warrant the setting aside of this verdict.

Judgment on the verdict for the plaintiff.

WILLIAM WRIGHT vs. THE CITY OF BOSTON.

The statute of 1841, c. 115, in relation to main drains or common sewers, is a valid statute; and the by-laws of the city of Boston in relation to common sewers and drains, passed June 14, 1841, and March 7, 1844, (Charter and Ordinances of the City of Boston, 356,) are in conformity with that statute, and valid; and owners of vacant lots on a street in which a common sewer has been laid in pursuance of such by-laws, are properly assessed for their proportion of the cost thereof, as well as owners of lots built upon.

An order of the mayor and aldermen of Boston, directing a main drain to be laid, upon a petition setting forth that the safety and convenience of the city require such a drain, is a sufficient adjudication of the necessity thereof under the city by-laws.

It seems that assumpsit will not lie in this commonwealth, to recover back a tax paid under protest, unless the tax is entirely void; if the objection to the tax is merely some defect or irregularity in making the assessment, the remedy is by appeal.

THIS was an action of assumpsit, brought to recover the sum of seventy-one dollars and eighty-five cents, with interest, which the defendants received from the plaintiff through the collector of taxes, and which was delivered to the collector under protest, to prevent a levy upon and sale of the plaintiff's land, for the collection of a tax assessed by the city on land of the plaintiff, under the circumstances set forth in an agreed statement of facts, which are sufficiently stated in the opinion of the court.

If the court shall be of opinion that the plaintiff, upon these facts, can maintain his action, judgment is to be entered for the plaintiff for the above sum of \$71.85, with interest from payment; otherwise, the plaintiff to become nonsuit.

Judgment having been ordered by *Bigelow, J.*, for the defendants, the plaintiff appealed to this court.

B. F. Hallett, for the plaintiff, cited *Boston v. Shaw*, 1 Met. 130; *Goddard, Petitioner*, 16 Pick. 504.

P. W. Chandler, (city solicitor,) for the defendants, cited *Boston v. Shaw*, 1 Met. 130, and cases there cited; *Osborn v. Danvers*, 6 Pick. 98; *Preston v. Boston*, 12 Pick. 7.

SHAW, C. J. This was an action of assumpsit, brought to recover the sum of \$71.85, with interest, which the defendants received from the plaintiff, under protest, as the amount

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of a tax assessed upon him, and it comes before the court upon an agreed statement of facts. The plaintiff is the owner of a vacant lot of land on Broadway and G streets, in South Boston. On the 21st of April, 1849, George E. Bent and others, interested in lands abutting on Broadway, petitioned the mayor and aldermen of the city, that a drain might be laid from Dorchester street, easterly through Broadway, to the estate of Mrs. Burrill. The plaintiff was not one of the petitioners. On the thirtieth of April the mayor and aldermen ordered the sewer to be laid, and notice to be given that, on the 7th of May, they would consider the subject of assessing the expense thereof on all persons who might enter their drains into such sewer, or, by any more remote means, receive any benefit from it, and that all persons objecting would then be heard. On the 7th of May, it appearing that notice had been given agreeably to the order, and no objection being made, the subject was referred to the Committee on Sewers and Drains, with full powers to have said sewer made and assessed according to law. The sewer was then constructed under the direction of this committee, extending eastwardly to the lot next beyond the vacant lot of the plaintiff, and, on the 16th of July, 1849, the superintendent of common sewers having made his report on the subject to the mayor and aldermen, they passed an order as follows, viz :—

“ Whereas, pursuant to an order of this board, passed on the seventh day of May, 1849, a common sewer has been constructed in Broadway, above Dorchester street, the cost of which was seven hundred eighty-three dollars and sixty-five cents, one quarter part whereof being deducted, to be paid by the said city, there remains five hundred eighty-seven dollars and seventy-four cents, *to be charged to persons benefited by the same*, according to law. It is, therefore, ordered, that the persons named in the schedule hereunto annexed, being benefited as aforesaid, be and they hereby are charged and assessed with the sums therein set to their respective names, as their proportional part of the expense of the said sewer, and the same is ordered to be certified, and notice thereof given to the parties aforesaid, their tenants or lessees.”

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The report of the superintendent set forth the names of the owners of the land benefited, the number of feet owned by each, the value of the land a foot, and the valuation and assessment of each. Mr. Wright's lot was seven thousand feet, valued at fifty cents a foot, and his contributory share was fixed at \$69.95. An order was then issued for the collection of the tax so assessed, and he paid his share, under protest, with costs to the collector. It is further agreed that the plaintiff's vacant lot abuts on Broadway and G street, that the drain passes his lot, and that, upon Mrs. Burrill's lot adjoining his, there is a dwelling-house. There is no dwelling house between Mrs. Burrill's and G street, and it is agreed that a plan of the land, annexed to the agreement, shall be a part of the case. From this plan, it appears that the plaintiff's land is estimated, for the purpose of taxation, to extend only seventy feet back from Broadway, although the lot belonging to him includes a great deal more, that strip of seventy feet wide being all that was supposed to be benefited by the drain. It is admitted that the plaintiff has not used the drain, and that his land is not drained by it. The parties also agree that if, upon this statement, the court are of opinion that the plaintiff can maintain his action, judgment shall be entered for the plaintiff, with interest from payment, otherwise he shall become nonsuit.

There were here various lots intended to be benefited by the drain, some of them having houses upon them, others not. The case of *Downer v. Boston*, 7 Cush. 277, was similar to the one before us, in this respect, if not in all; and many of the questions discussed in this case were considered and decided in that.

We exclude from our consideration of this case, all provisions of law relating to the draining of low or waste lands. The statutes on that subject have no reference to this case. The statutes which we are to consider are provided for the draining of houses. The public have, indeed, some interest in such draining, on the grounds of health and general convenience; but it is not mainly with those views that these statutes have been framed. Prior to the year 1834, this subject

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was unsettled. If drains were desired, they were petitioned for, and the cost of making them was assessed and apportioned among those engaged in the common enterprise, according to previous agreement. If there were vacant lands or houses, whose owners did not choose to take advantage of the drain, no assessment was laid upon them. The drains were then the common property of those who paid for them, and records were kept, in order that it might be known to whose benefit they enured, and to whom were to be paid the contributions of those who might subsequently take advantage of them. In 1834, main drains were made public property, and were to be so held. In 1840, the case of *Boston v. Shaw*, was decided, which arose out of the making of a drain in Pinckney street, and the assessment of a tax was made in proportion to the valuation of the estates bordering on the drain, on the owners thereof. The tax was assessed according to rules established by the city, and when the case came before the court, it was considered that the by-law was invalid; and the court took occasion to indicate what it deemed the proper course to be taken. In that case, it was suggested that the tax should be assessed on all the persons benefited, not merely upon those who had built on their land, but upon those who might afterwards build as well. The potentiality of receiving a benefit from the sewer was the thing to be charged with the tax. This added a value to the land *in presenti*, either for the purpose of sale or improvement. By the statute of 1841, c. 115, all who enter on the drain, or who receive any benefit from it, are subject to be assessed for it. The statute also provides that the selectmen of towns, or the mayor and aldermen of cities may lay and repair main drains or common sewers, and, when made, they shall be the property of the town or city. This last provision applies as well to drains previously made, and belonging to private individuals, as to those subsequently to be constructed. With regard to the former class, all that the city or town can require is a small sum from each person benefited, for the privilege of entering upon the drain. As to those which are to be built hereafter, all persons benefited, whether by entering

the drain or by any more remote means, are to be assessed for it. The land is estimated for this purpose, with reference to its capacity to be benefited by a drain, and it is taxed, not according to the value of the building upon it, but according to the value of the land, without reference to any building; thus putting house-lots actually built upon, and vacant lots, equally capable of being built upon, and adapted, if not intended, for that purpose, on an equal footing.

There are other provisions of law, founded on the right of the public to preserve the general health and repress nuisances, under which selectmen are authorized to require the owner of a house, so situated that it may be drained, and, without draining, is dangerous to health or generally offensive, to enter a drain from such house into the common sewer; and, if he does not do so, to do it for him, and require him to pay the expense. The second section of the act of 1841, provides that every person who may enter his drain into the common sewer, or who, by any more remote means, shall receive any benefit thereby, shall pay to the town or city a proportional part of the charge of making and repairing the common sewer, to be ascertained and assessed by the selectmen or the mayor and aldermen, and certified to the party to be charged. And the argument is, that this charge is to be assessed only on those who are immediately benefited, because there are other provisions under which those who enter their drains into the common sewer are chargeable at the time of entering. There are three classes of persons to receive this benefit. (1) Those who have houses, but who do not desire to enter their drains into the sewer. (2) Those who have lots with no buildings upon them; and (3) Those who have houses, with drains with which they do wish to enter.

It is provided by the city ordinance, that this last class shall pay, at once, not less than ten dollars, for a permit to enter. The statute further provides, that all assessments so made for common sewers, shall constitute a lien upon the real estate assessed, for one year, and if the same are not paid within three months, they may be levied by sale of the estate. This goes to show, that the cost of the drain is to be assessed

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forthwith on all the estates which may be beneficially affected by its construction. The city is to pay at least one fourth part of the expense. The city of Boston, under its ordinances, pays just one fourth. No security for the tax is given by law, beyond the lien for one year. The statute thus gives simply a reasonable time for enforcing payment. It therefore indicates its purpose to be, that the whole expense, deducting the city's one fourth, shall be immediately assessed at the outset. The persons then benefited must pay at once, and no provision is made for reimbursing the city the expenses incurred for the benefit of vacant lots. This lien, and this want of any provision for payments being made subsequently, go strongly to show the intent of the statute to be, that the whole expense shall be paid forthwith.

In pursuance of this act, which allows a large discretion to the mayor and aldermen, an ordinance was passed by the city of Boston. It was certainly fit that the matter should be regulated by an ordinance, but a question has arisen respecting the reasonableness of that ordinance. Its first section directs the position, size and depth of the drains, and the mode of their entrance laterally into the sewer.

It goes on to make certain provisions, which the mayor and aldermen have the right to make, in regard to the making of drains for recusant owners, where the public health requires it, and further provides a penalty for the entering of drains, without a permit, and gives authority to an officer, the superintendent of sewers, to grant such permits, for which such sum, not less than ten dollars, as the mayor and aldermen shall prescribe, shall be paid by the persons to whom such permits are granted. The general expenses of making any drain are to be ascertained and reported to the Board, and after a deduction of not less than one fourth of the whole expense, the balance is to be assessed, according to their value, independently of the value of any buildings upon them, upon the estates benefited, and charged to the owners thereof. This question arose in the case of *Downer v. Boston*. The same point was made there, and it was urged that no persons were to be charged with a share of the expense of

any drain, except those presently and immediately benefited by it.

Mr. Downer had not, previously to the trial, derived any immediate benefit from the drain in that case by actual use ; but the court held that the lots owned by him were benefited, by more remote means than the immediate entering of a drain, by fitting it for improvement and enhancing its value, and, therefore, that he was liable to the tax assessed.

It is said that the plaintiff has received no benefit whatever till he has entered a drain from his land, and that he is liable to be assessed when he does so enter it. This latter objection, we think, is founded upon a mistake. The charge made for entering the drain afterwards, is merely to cover the expense of taking up the street, and other proceedings, made necessary by the entry.

For the tax on all who are remotely as well as immediately benefited by the drain, there are several reasons. In the first place, there would necessarily, upon the system contended for, be a disproportionately large charge on those who are immediately concerned, for the reimbursement of whom no provision is made ; while, upon the construction which the court have adopted, the tax is as nearly equal in its pressure as it could be made. And again, the laying of the drain is an immediate benefit, in one sense, to the vacant lots which it is capable of draining, if it increases their value for improvement or sale, as it obviously would ; and, for these reasons, buildings are excluded from the assessment, and it is laid only upon the lots. The proportion intended by the statute is the proportion among the lots ; and a tax laid upon them is to be made in proportion to their value. This brings the whole transaction within the provisions of the statute, and in this way all are taxed upon the same just and equal principle, with reference to the benefit conferred at the time.

It is next urged that the mayor and aldermen did not adjudicate the question of laying a sewer, according to the provisions of the city ordinance. But their order, upon a regular petition, setting forth that the safety and convenience of the city required such a main drain, directing it to be laid, is a

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sufficient adjudication. The objection that the tax is not proportional is disposed of by the considerations before expressed, if it was made according to the value of the lots at the time ; and nothing appears to the contrary.

Another argument is, that the tax is unjust and contrary to the true principles of taxation, if laid upon land, exclusively of the value of the buildings upon it. If this were a general tax on property, to raise money for public use, there is no doubt it would be so. But it is not the case. The assessment is laid upon the lands specially and exclusively benefited by the drain, upon the simple principle of equalizing the expense upon those who enjoy its advantages. A similar construction is given to similar English statutes. *Soady v. Wilson*, 3 Ad. & El. 248. A further objection is, that if the tax is on the lots alone, and not on real estate generally, the lien must be coincident with it, so that there will be a lien on the land and not on the buildings upon it. But doubtless the lien affects the whole estate, because the buildings are fixtures, inseparably included with the land, as making part. But this does not prevent the land from being valued separately, for a special purpose, nor from making the estate chargeable with a lien for the assessment.

There are several other remarks of counsel which have not escaped our attention. The case has been very fully argued. The case in New York of *The People v. The Mayor, &c. of Brooklyn*, 6 Barbour, 209, has also been considered. It appears by that case, that it has been the practice in New York, to make public improvements, sometimes very extensive, in particular localities, and assess the expense upon the owners of real estate in their vicinity, supposed to be benefited. Streets, squares, and the like were frequently so laid out, and probably, the practice was, occasionally, a very great source of oppression to the parties assessed. Improvements like this, and others in their nature public, are held to have been prohibited by the new constitution of that state. But this case goes much beyond any ground we have ever taken in this state. The principle generally adopted here is, that public improvements, although local, must be paid for at the public

expense. Common highways are so made, and it is for the public to decide where and how they shall be made. This term "the public" may mean, in such cases, the inhabitants of the town, the county, or the state, according to the connection in which it is used. The proprietors of common lands, common fields, or waste or low lands, have sometimes been allowed by law to associate as *quasi* corporations, for the purpose of managing their property, in which they have certain interests in common.

In these associations, where expenses are incurred for the common benefit, provision is made for assessing them equally, in proportion to their respective interests, nor can this be considered inequitable.

These cases are, perhaps, not in all respects strictly analogous; and yet they involve the same principle on which it rests, which is, that when certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden. This principle appears to be a sound and legitimate one, and has been too long acted upon in this commonwealth, to be now set aside. We are of opinion, therefore, that the statute was valid, the by-law was made pursuant to its authority, and that, under them, the plaintiff was rightly assessed for his proportion of the cost of the drain in question.

But, to avoid being misunderstood, we think it proper to add, that if the views of the court had been other than they are, upon the grounds above stated, we are strongly inclined to the opinion, that this action for money had and received could not be maintained, unless, indeed, the act had been held wholly unconstitutional, inoperative and void.

The only ground upon which a party is allowed to pay a tax or assessment under protest, and afterwards maintain an action to recover it back, is when the tax was wholly void, a mere nullity; when a party can have no action or take no appeal, and when the collector appears with his warrant, he

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must pay or have his person arrested or property taken, then he pays under a species of duress; and as the tax was wholly void, as, when the party was not an inhabitant and not liable to pay any tax, the city or town into whose treasury it has been paid, cannot equitably retain it. *Preston v. Boston*, 12 Pick. 7; *Boston Water Power Co. v. Boston*, 9 Met. 199; *Howe v. Boston*, 7 Cush. 273; *Lincoln v. Worcester*, 8 Cush. 55.

For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, which does not go to show the whole proceeding a nullity, he must take his appeal, if he has one. On such an appeal, he would have all the benefit of a jury trial, the instructions of a court in matters of law, with a right to come to this court to decide on matters of law, as in other questions of contested right. The law in this case, *St. 1841, § 4*, gives the party such right of appeal.

The case of *Downer v. Boston* is no authority, nor would it have been if the tax payer had recovered. It was not an action to recover back; it was an appeal from the judgment of the court of common pleas, affirming the correctness of the proceedings in assessing and levying the tax.

It is not, however, necessary to express any opinion on this subject, because the cause is decided on other grounds.

Judgment for the defendants.

CHARLES C. FOSTER vs. SIEGMUND M. PEYSER.

A clause in a lease that "the owner shall not be liable for any repairs on the premises during the term, the house being now in perfect order," has respect only to the condition of the house as an edifice in perfect repair, and not to the present or future purity of the air within it.

In a sealed lease of a house for a private residence, there is no implied covenant that it is reasonably fit for habitation.

THIS was an action of debt, for the rent reserved in a written lease, signed and sealed by the parties, which stipulated,

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so far as material, that Charles C. Foster, doth hereby "lease, demise, and let unto S. M. Peyser, a certain brick dwelling-house, situated on Harrison avenue, in Boston, to be used as a private dwelling-house only, and not as a boarding-house; and it is understood and agreed that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the lease, the house being now in perfect order. To hold for the term of three years from the fifteenth day of August, 1848, yielding and paying therefor the rent of three hundred and fifty dollars per annum. And the said lessee doth promise to pay the said rent in four equal quarterly payments, on the fifteenth day of November, February, May, and August, during the lease, and to quit and deliver up the premises to the lessor, or his attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said lessor, and to pay the rent, as above stated."

The plaintiff declared in this suit for the quarter's rent, which became due by the terms of the above lease on the 15th day of May, 1850. The trial was in the court of common pleas, before *Bigelow, J.*, and the case came before this court on the defendant's exceptions.

It was admitted that the defendant had paid to the plaintiff all the rent which had previously become due under the lease, being six quarters.

The defendant offered evidence to show that, soon after the execution of the lease, and about the time when the defendant went into occupation of the premises, a noisome and filthy stench existed in the house, which rendered it disagreeable to the inmates and injurious to their health; that, soon after the defendant moved into the house, some members of his family suffered from sickness, and that there was much sickness in his family while he remained on the premises; that this sickness was occasioned or aggravated by the bad state of the air of the house; and that this stench continued without abatement, from the time the defendant moved into

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the house until he removed therefrom, in April, 1850. The evidence of the defendant also tended to show, that this stench was caused by a defect in, or want of repair of, the drain of the house, and it would have cost from two to three hundred dollars to put the drain in repair, so as to remedy the difficulty, but it did not distinctly appear by the evidence what the precise difficulty was in the drain, nor that such outlay was necessary to put it in good order.

The defendant also offered evidence to prove that, soon after he moved into the house, he complained to the plaintiff of the stench in the house, and that he repeated these complaints several times subsequently. It also appeared that the plaintiff, in answer to these complaints, expressed his ignorance of the cause of the stench, and that he sent a mechanic to the premises to examine into and remedy the difficulty; that this person, sent by the plaintiff, did go to the premises on several occasions, and made such repairs as he thought necessary, all of which proved unsuccessful.

It further appeared, that the defendant abandoned the occupation of the premises, on or about the first day of April, 1850, and notified the plaintiff that he should no longer continue to pay the rent of the premises under the lease, alleging that the house had become untenable. The plaintiff offered evidence to show that the stench did not exist to the extent described by the witnesses of the defendant.

It was admitted by the defendant that, during the second quarter of his occupation of the premises, he caused pipes and fixtures for the use of gas to be put into the house, having obtained an agreement from the plaintiff to pay one half the cost thereof, at the termination of the lease. It was also in evidence that, during the fifth quarter of the defendant's occupation, the plaintiff, at the request of the defendant, purchased and caused to be set up in the house a cooking-range, and that the defendant agreed to pay one third of the expense thereof.

On the foregoing evidence, the defendant asked the judge to instruct the jury, (1) that if, at the time of letting the house, the plaintiff knew of the nuisance, and did not disclose

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it to the defendant, and that the defendant hired the house, supposing it to be in perfect order, then such letting was a fraud on the defendant, and he was not bound by the lease ; and the judge so instructed the jury ; (2) that there was an implied agreement, in the letting of a house for a private residence, that it is reasonably fit for habitation ; (3) that, in this case, there was an express covenant or warranty on the part of the plaintiff, that the house was, at the time of the execution of the lease, in perfect order ; that, therefore, if the jury should find that the house was not in perfect order at the time of the execution of the lease, but was, owing to the nuisance aforesaid, not reasonably fit for habitation during the time the same was occupied by the defendant, he was not liable in this action.

The judge refused to instruct the jury as requested by the defendant, on the second and third points above stated.

The jury were requested by the judge to find, whether the house was in perfect order at the time of the execution of the lease. The jury found a verdict for the plaintiff, and, in answer to the inquiry by the judge, stated that they found the house was not in perfect order at the time of the execution of the lease, but that the fact was not known to the plaintiff at the time.

S. C. Maine, for the defendant, cited *Taylor's Landlord & Tenant*, 184 ; *Collins v. Barrow*, 1 Moody & Rob. 112 ; *Smith v. Marrable*, 11 M. & W. 5 ; *Cowie v. Goodwin*, 9 Car. & P. 378 ; *Salisbury v. Marshal*, 4 Car. & P. 65.

F. L. Batchelder, for the plaintiff, cited *Sutton v. Temple*, 12 M. & W. 52 ; *Hart v. Windsor*, Ib. 68 ; *Dutton v. Gerrish*, ante, 89 ; *Fowler v. Bott*, 6 Mass. 63 ; *Phillips v. Stevens*, 16 Mass. 238 ; *Bigelow v. Collamore*, 5 Cush. 226 ; *Westlake v. De Graw*, 25 Wend. 669.

METCALF, J. As the jury returned a verdict for the plaintiff, it must be taken as found by them that he did not know of the nuisance when he demised the house, and that he was not guilty of any fraud on the defendant.

There were two other questions in the case. *First*, whether by the terms of the lease, the plaintiff warranted that the

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house was reasonably fit for habitation. The court ruled that he did not; and we are of opinion that the ruling was right. The words of the lease, on which this question arises, were these: "It is understood and agreed that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the term; the house being now in perfect order." It seems clear to us, that this clause refers only to repairs. It states, in effect, that the house was in such a condition, that no repairs would be necessary during the term of three years, unless some casualty should make them necessary. And, by another provision in the lease, the lessor was to bear the loss caused by casualties. The agreement, that the house was "in perfect order," had respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it.

The *second* question was, whether there is an implied covenant, in a sealed lease of a house for a private residence, that it is reasonably fit for habitation. The court refused to instruct the jury that there is any such implied covenant in such a case. And it is well settled, by authority, that there is not.

This question has been discussed in numerous recent cases in England. But it is unnecessary to refer to more than one of them, viz: *Hart v. Windsor*, 12 Mees. & Welsb. 68, decided by the court of exchequer, in 1844. In that case, Mr. Baron Parke, after reviewing all the previous cases, clearly states the law on this point, and the grounds of it. And as his views are perfectly satisfactory to us, we shall merely quote the following passages from his opinion: "It is clear that, from the word 'demise,' in a lease under seal, the law implies a covenant — in a lease not under seal, a contract — for *title* to the estate merely; that is, for quiet enjoyment against the lessor and all that come in under him, by title, and against all others claiming by title paramount during the term; and the word 'let,' or any equivalent words, which constitute a lease, have, no doubt, the same effect, but no more. Shep. Touch. 165, 167. There is no authority for saying that these words imply a contract for any particular state of the property at the time

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of the demise ; and there are many, which clearly show that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised ; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down, or destroyed by fire ; *Monk v. Cooper*, 2 Stra. 763 ; *Belfour v. Weston*, 1 T. R. 310 ; and *Ainsley v. Rutter*, there cited ; or gained upon by the sea ; *Taverner's case*, Dyer, 56 a ; or the occupation rendered impracticable by the king's enemies ; *Paradine v. Jane*, Aleyn, 26 ; or where a wharf demised was swept away by the Thames ; *Carter v. Cummins*, cited in 1 Chan. Cas. 84. In all these cases, the estate of the lessor continues ; and that is all the lessor impliedly warrants. It appears, therefore, to us to be clear, upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, fit for habitation or cultivation." " We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position ; and though, in the case of a dwelling-house taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes — for building upon, or for cultivation ; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties, in every case, to protect their interests themselves, by proper stipulations, and if they really mean a lease to be void, by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

The decision in the foregoing case has been recognized by the English court of common pleas, in *Surplice v. Farnsworth*, 7 Man. & Grang. 576 ; by the supreme court of New York, in *Cleves v. Willoughby*, 7 Hill, 83 ; and is referred to as the settled law, in Addison on Contracts, 412 ; Archb. Land. & Ten. 67, 158 ; and 1 Platt on Leases, 613.

In the cases which were cited for the defendant, (except two or three *nisi prius* decisions, which are virtually, if not

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directly, overruled by *Hart v. Windsor*,) in which tenants have been allowed to withdraw themselves from the tenancy, and to refuse payment of rent, there was either fraudulent or erroneous description of the demised premises, or they became uninhabitable by the wrongful act or omission of the lessor.

Judgment for the plaintiff.

FREDERIC W. MYRICK & others *vs.* CHARLES C. DANE & others.

A release by two of three joint obligees is a bar to a suit by the third, brought in the name of the three, for one third of the benefit of the contract. In such joint action the plaintiffs cannot set up that such release was a fraud on one of their number, and thus deprive the defendant of a legal defence to the claim of the three.

No action at law can be maintained on a joint agreement by the plaintiffs and defendants, who were all members of the same joint stock company, formed to purchase a vessel of the plaintiffs.

Parol evidence that a contract, signed by the plaintiffs jointly with the defendants, and apparently a joint undertaking by all the signers, was in fact signed by the plaintiffs as one party, and by the defendants as a second party, is inadmissible as tending to contradict or control a written instrument.

THIS was an action of assumpsit, containing the common money counts, tried before *Bigelow*, J., in the court of common pleas, whence it came to this court by a bill of exceptions. It was brought by Frederic W. Myrick, John P. Farrar, and Joshua Leavitt, against Charles C. Dame and a great number of others, upon only three of whom the writ was served.

The plaintiffs filed therein a special count, alleging that the "defendants, on the 24th day of February, in consideration that the plaintiffs had contracted for and were owners of a certain barque called *The Helen Augusta*, which they were fitting for a voyage to California, which they agreed to sell to the said defendants and relinquish their interest therein, promised and agreed, by a writing here in court to be produced, to form a joint stock company, not to exceed seventy five mem-

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bers, for the purpose of proceeding to California in said barque, and when said company was full, to purchase, in equal shares, of the said plaintiffs the said barque and authorize them to fit her for sea as originally intended, and to pay the said plaintiffs, in addition to all bills and expenses that they had or might subject themselves to for said vessel, previous to her sailing, the sum of fifteen hundred dollars." It also averred "that the company was full; that the defendants have purchased said vessel and fitted her for sea; and that they, the plaintiffs, have been at expense, in time and in cash payments for said vessel, in the sum of three hundred dollars; that they have demanded of said defendants said sums of \$300 and \$1,500; yet the said defendants, not regarding their said promise, neglect and refuse to pay the same."

Under this count the plaintiffs filed a specification of Farrar's claim for his services and expenses in going to sundry places between the 1st and 20th of February, 1848, amounting to \$369.14, to which was added "one third interest in the contract for The Helen Augusta, aside from the above expense, 500 dollars." To this specification was appended the following memorandum, signed by the plaintiffs' attorney: "The above embraces said John P. Farrar's one third interest in the entire contract declared on, and this suit is prosecuted to recover the same, if it should appear that the other parties have been satisfied for their interest in the same, or otherwise disclaim."

In order to prove their case, the plaintiffs introduced in evidence a contract, dated February 1, 1849, signed and sealed by Joseph Coffin and Frederick W. Myrick, in which Joseph Coffin, ship-builder, and owner of a new vessel now lying on the stocks, agreed to launch her as speedily as possible, and deliver her afloat, "in good order and condition complete, together with her spars and customary finish."

And F. W. Myrick and Co., therein agreed "to pay the said Coffin for fulfilling his contract the sum of \$9,200, nine thousand two hundred dollars, one half to be paid before the vessel sails on her voyage, and the remainder in satisfactory notes or paper on three and six months with interest."

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The plaintiffs also introduced in evidence a contract dated February 24, 1849, signed by the plaintiffs and the first named defendant and others, agreeing "to form a joint stock company, not to exceed seventy-five members, for the purpose of proceeding to California in the new barque Helen Augusta. And when the company shall be full, to purchase, in equal shares, of the present owners, the new barque Helen Augusta, and authorize them to fit her ready for sea as originally intended; and to pay the said in addition to all bills and expenses that they have subjected themselves to for said vessel, previous to her sailing, the sum of fifteen hundred dollars."

The plaintiffs then offered the following testimony:—

Joseph H. Adams, president of an insurance company, testified that the three plaintiffs procured insurance on the barque Helen Augusta, at his office, on the ninth of March, 1849, the policy to take effect March 14th; that the barque was at Newburyport at the time of the insurance, and that she was insured by the plaintiffs on their own account, and not for whom it might concern; that this policy was cancelled the 20th of April following, and a new policy was taken out on the barque, in favor of other persons.

Joseph Coffin testified that he agreed to sell the barque Helen Augusta to the plaintiffs, in January, 1849, according to the contract first above set forth, and that all the plaintiffs were present when the bargain was made; that the plaintiffs could not get the money to fulfil their contract, and that other persons took the bargain in their stead; that before he conveyed it to the others, captain Myrick, one of the plaintiffs, had paid him \$3,300, and that the two other plaintiffs never paid him anything towards the price of the barque.

Josiah C. Proctor testified that, early in February, 1849, the plaintiffs employed him to act as agent of a barque which they had bought of Mr. Coffin, to fit her for sea, get provisions, &c., under a written contract, the terms of which are not material in this case.

That he saw the second contract above set forth, and saw the present plaintiffs and several of the defendants sign it. The witness testified to the signatures of several of the defendants who did not sign in his presence; he further testified

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that the paper was left in his office for signatures; that, when the vessel sailed, which was on the tenth of May, all the persons whose names are signed as members of the company, went in her, including two of the plaintiffs, Myrick and Leavitt, except the other plaintiff, John P. Farrar, and one Merritt; that the joint stock company kept records, which they took with them; that there was a vote on their records declaring the company full, and that the defendants, including those on whom the writ was served, declared it to be full. The witness also testified that said John P. Farrar rendered many services in getting up the company, by procuring members and endeavoring to raise money, and in other ways; and that, for about six weeks, he devoted himself to attending to the concerns of the company; that Williams, one of the defendants, stated that the company would not have been raised if it had not been for Farrar's aid, to which Dame, another of the defendants, replied that Farrar had done a good deal up to a certain time, and was sorry he had not continued to do so; that Farrar received from him, as agent of the company, money from time to time, not exceeding in all \$30, which was paid to him by order of Myrick; that he saw on the records of the company a vote by which a share in the company was presented to Myrick, and that Myrick went out as captain of the vessel. He also testified that he received no money from Farrar on account of the company, on his own account, but that Farrar brought to him, on one occasion, \$200, which he had received from another member of the company, and paid over to the witness on behalf and on account of such other member; that Myrick did pay him over money, and that, after the company was formed, a committee was raised, of which Farrar was a member, to procure money for the company.

The plaintiffs here rested their case.

The defendants then contended that the evidence showed that the plaintiffs and defendants were all members of the same joint stock company, and that no action could be maintained by the plaintiffs against the defendants, on account of

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the doings, transactions and services rendered in and about the affairs of the company, upon the foregoing evidence. They also introduced in evidence (having duly specified the defence) a release signed and sealed by two of the plaintiffs, Myrick and Leavitt, to the three defendants on whom the writ was served and two others, in which they "released, discharged, and acquitted the said Dame, and others, of and from all debts, dues, demands and claims which we or either of us have jointly or severally, or jointly with one John P. Farrar of said Boston, against the said Dame and others, or against either of them, or against them jointly with any other person or persons, or which we may or might have against them or any of them, by reason of any thing done or agreed to be done, from the beginning of the world to the present day" This release was dated April 27, A. D. 1849.

The plaintiffs, on this evidence, claimed the right to go to the jury to recover the amount alleged to be due to Farrar, one of the plaintiffs, alleging his right to use the names of the other two plaintiffs who had released, for that purpose. They also contended that the release, on the foregoing evidence, should be set aside for fraud. The plaintiffs offered no evidence in reply.

But the judge being of the opinion that the plaintiffs, on the foregoing evidence, could not, in point of law, maintain their action, did not permit the case to be argued to the jury on the evidence, but directed the jury to return their verdict for the defendants, which they did accordingly, and the plaintiffs thereupon excepted.

F. W. Sawyer, for the plaintiffs.

G. H. Preston, for the defendants.

SHAW, C. J. The action is assumpsit, originally brought on the money counts only, but afterwards a special count was filed, and a specification of the plaintiff's claim under the rule of court.

The instrument stated in the declaration and offered and relied on in evidence is dated February 24, 1849.

It purports to be an agreement of the subscribers to form a joint stock company, &c.

To purchase in equal shares of the present owners of the barque; authorize them to fit her, &c.; and pay the said —, probably owners, in addition to expenses, &c., \$1,500.

This was signed by the three plaintiffs, the four or five defendants, and a large number of others.

It is a promise by all the subscribers; it is not a promise to the plaintiffs *nominatim*, but the plaintiffs insist that it is a promise to them by implication, because they were the owners.

The plaintiffs then offered evidence to prove that they were the owners. Coffin, the builder, testified that the three plaintiffs did contract for her, though the contract was in the name of Myrick & Co., but that they could not pay for her, and in consequence of this he conveyed her to other persons.

This promise was dated 24th February, 1849. The defendants offered a release executed 27th April, 1849, from Myrick and Leavitt, two of the plaintiffs, to the three defendants and some others, of all claims and demands due them personally or to them or either of them jointly with Farrar, the third plaintiff.

The court, on the evidence, instructed the jury that the action could not be maintained, to which the plaintiffs excepted.

We think this direction is right on several grounds.

1. The first is, that the promise not being made to the plaintiffs by name, but the promise being only to pay the owners, the plaintiffs could not show themselves the promisees, by the words of description, without proving their ownership, and their capacity to convey; and this proof failed. The evidence is that they contracted with the builder, to purchase her, but they did not comply with that contract, and he, in fact, conveyed her to other persons. This is not controlled by the fact of their getting her insured.

This, however, does not appear to be the ground of exception taken at the trial, but there are two others depending merely upon matters of law, which are decisive.

2. That the plaintiffs and the defendants were jointly concerned in getting up the stock company, that the plaintiffs were members, and if there was any promise to the plaintiffs,

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it was a promise made by themselves, equally with the others, and being equally promisees and promisors, they cannot sue themselves, and their only remedy would be in equity, for an account as between partners.

3. This is a joint action ; a release, by two of the plaintiffs, is a bar. It is an extinguishment of the debt, due by the contract, if any ever existed. *Tuckerman v. Newhall*, 17 Mass. 581, 590.

To avoid the effect of this release, it was stated by the counsel in his opening, that the action was brought in fact by Farrar only, in the name of the three, to recover his third part of the benefit of the contract specified, to wit, his own several charges and expenses, together with \$500, one third part of the \$1,500 promised by the contract. But it is very manifest that if a contract at all, this was an open, entire, and executory contract, never severed, and the plaintiff has so treated it, by bringing an action in the name of the three plaintiffs jointly.

The plaintiff argued that he had a right to give evidence *aliunde*, that, though the written paper appears to be a joint undertaking of all the signers, in fact, the first three were parties of the first part, contracting with the others as parties of the second part; and the case of *Carpenter v. King*, 9 Met. 511, was cited.

That case held only, that when two persons had signed a written contract and obligation to a third, it might be shown by evidence *aliunde*, for the purpose of adjusting the relative rights and duties between the two obligors, that one was principal and the other surety. But that is not an authority for this point.

The admission of such evidence would be contrary to the plain rule, that parol evidence is not admissible to control or contradict written evidence.

It was also insisted that it should have been left to the jury, on the evidence to find, that the release given by two of the plaintiffs was a fraud on the third, and therefore could not avail the defendants. It was an offer by the three plaintiffs to prove that two of them committed a fraud on the third, in order to defeat the defendants of a legal defence, which they

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were making against a claim of the three. It was sufficient to state such a proposition to show it inadmissible.

If the plaintiff relied on a separate cause of action, he should have sued alone; but it is manifest that the evidence here offered would not sustain such action.

The plaintiff contended that this release could not avail the defendants, because it did not purport to be the act and release of the three. True, it was not the act of three, but it was the act and release of the two; and a release by either was a good defence to a joint action.

The authority cited by the plaintiffs is in point to show that a release by one is a good bar to a joint action. *Pierson v. Hooker*, 3 Johns. 68.

It was further insisted that there was no consideration for the release. Being under seal none was necessary.

Exceptions overruled and judgment on the verdict.

GEORGE D. DUTTON & others vs. IVORY F. WOODMAN & another.

In an action against A. and B. on a promissory note, signed by A. & Co., the point in issue being whether B. was a partner in the firm of A. & Co. at the date of the note, evidence that until A. commenced business under the firm of A. & Co., his credit was bad, is entirely irrelevant.

In an action against two, as alleged copartners, evidence of statements and declarations, which would be admissible only upon the assumption of the existence of the copartnership, is incompetent to prove such copartnership.

On the reexamination of a witness, no questions can be put which do not relate to matters inquired into on the cross-examination.

The fact sought to be established by the plaintiffs in a suit being the existence of a copartnership between the defendants, under a certain name, a judgment recovered by the same plaintiffs against the same defendants, as copartners, under such name, on a note given at the same time with the one in suit, is admissible, though not conclusive evidence of that fact.

In an action on a promissory note, against A. & B., as copartners, under the name of A. & Co., B. denying that he was a partner of A. at the date of the note, a letter written by a third party, who was a salesman and purchasing agent of A. & Co., to B., in which the writer said, that A. had stated to him that a copartnership had been formed between A. and B., and that he wrote to ascer

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tain whether B. was "really responsible, as one of the partners, for the payment of the goods bought for this store," adding, "this proceeding is rendered necessary, from the fact that you will need, or, at least, do need now a credit, in order to carry on the business successfully," and "I write this with the knowledge of A.," which letter was never replied to by B.,—taken in connection with a subsequent conversation between the writer and B., in which the letter was talked about, and B. was again asked by the writer, whether he was a partner in the firm of A. & Co., to which he replied, that he should neither admit nor deny it,—is competent evidence to be submitted to the jury, in connection with the other testimony, to prove the copartnership.

THIS was an action of assumpsit, to recover the amount of a note for \$480.97, dated the 26th of October, 1848, payable in six months, and signed by I. F. Woodman & Co. It was tried before *Mellen, J.*, in the court of common pleas. No service was made on Ivory F. Woodman, but the other defendant, E. W. Woodman, was arrested and held to bail. At the trial he filed, as a specification of defence, that he was not a partner of I. F. Woodman, and never was a member of the firm of I. F. Woodman & Co.

The plaintiffs offered J. C. Thurston as a witness, who testified that he had known I. F. Woodman since 1844, and was employed in his store from June, 1848, to January, 1849, as salesman and purchaser, and that, in May, 1848, Woodman went into insolvency as a partner of one Alexander, under the name of Woodman & Alexander; that one Hazard purchased the stock of goods and assets of Woodman & Alexander, and continued the business in the same store, in North Market street, in Boston, until September, 1848; that, in September, 1848, a change was made in the signs on the store, and that the name of I. F. Woodman & Co. was painted on the door-posts and signs, and the business of the store was done in the name of I. F. Woodman & Co., from September, 1848, to January, 1849; that, in January, 1849, the property in the store was attached, and a keeper put in, and that the business then passed into the hands of other persons, the firm of I. F. Woodman & Co. having failed.

The plaintiffs inquired of the witness whether or not the credit of I. F. Woodman was good in the summer of 1848, and until the change of September, above spoken of. This

was objected to by the defendants, and the presiding judge sustained the objection, and ruled that the question could not be asked.

The witness further stated that, in January, 1849, while the stock in the above-named store was under attachment, he saw E. W. Woodman in the store, and had a conversation with him; that the witness asked him, at the time, if he was a partner in the firm of L. F. Woodman & Co., to which Woodman replied that he should neither admit nor deny it. The witness then told him that his brother, L. F. Woodman, had told the witness that he, E. W. Woodman, had come to Boston with funds, notes, &c., in order to settle up the affairs and go into business; to this E. Woodman replied, that he found things so different, that he had done or should do nothing about it. The witness furthermore said that, on the 12th of October, 1848, he wrote to the defendant, E. W. Woodman, saying:—

“ I learn from your brother, L. F., that you have formed a copartnership with him, and contemplate coming to this city to assume an active part in the concern. As there has been no public announcement made to that effect, and as you are not here, I have written to ascertain if you consider yourself really responsible as one of the partners, for the payment of the goods bought for this store. This proceeding is rendered necessary from the fact that you will need, or, at least, do need now a credit, in order to carry on the business successfully. I write this with the knowledge of your brother, feeling that it is for the interest of this concern to know whether you wish to be considered as a partner, and are willing to assume the responsibilities as such.”

That to this letter he never received an answer in writing; that, at the interview between him and E. W. Woodman, in January, 1849, the latter told him that he received this letter of October 12, 1848, but that he was absent from Wilton when it arrived, and that, shortly after he did receive it, he saw his brother, L. F. Woodman, and that he did not consider it necessary to answer it, and that this was the reason why he did not answer it. The witness was asked as to the con-

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tents of this letter, but the defendant objected to such inquiry, because the letter itself was the best testimony. The plaintiffs offered to read the letter, after having shown it to the judge and to the defendant's counsel, and to the witness, who identified it; but, upon objection by the defendant to its introduction, the judge ruled that it was inadmissible, as it was not written by the plaintiffs.

The plaintiffs then asked the witness, if, at the time of the purchases made by him, in September, of the plaintiffs for L. F. Woodman & Co., he was directed by the plaintiffs to write the letter referred to by them. This was objected to by the defendant, and the objection was sustained.

The judge also ruled that no statements made by Thurston (either before or after the date of this letter) to the plaintiffs, as to the connection of E. W. Woodman with L. F. Woodman, or as to the credit of the latter, were admissible; and, furthermore, that all inquiries made by the plaintiffs of Thurston, as to the credit of the firm, or as to who its members were, were inadmissible.

On cross-examination of the witness, it appeared that he guaranteed to the plaintiffs the amount of their claim, at the request of L. F. Woodman, from which guaranty he had since been released; that he received from L. F. Woodman, for such guaranty, a promise of indemnity.

On reëxamination, the plaintiffs claimed the right to ask the witness what was said to him by L. F. Woodman at the time this indemnity was promised him; but the judge ruled that the plaintiffs could not pursue the inquiry, as no conversation was opened by the defendant on the cross-examination.

The witness further testified that the note in this case was given for an account running from September 25 to December 2, and that it was drawn by him and signed by L. F. Woodman, in the month of December, 1848, and dated back. He also testified that he drew another note, shown to him, dated December 2, 1848, for \$85, signed L. F. Woodman & Co., but he would not say whether it was signed on the day of its date or not, as he did not recollect.

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The plaintiffs then offered in evidence a judgment on a verdict rendered against E. W. Woodman and L. F. Woodman, as partners, in favor of these plaintiffs, at the October term of the court of common pleas, 1849, upon a note of \$85, as above referred to; but the judge ruled that, even if this was proved, the judgment would not be admissible as evidence.

The plaintiffs offered to prove that Thurston was told by L. F. Woodman, that his brother, E. W. Woodman, was his partner, before he wrote the letter; that he, Thurston, repeated this statement of L. F. Woodman to the plaintiffs; and that, at their request, he wrote the letter; but the judge ruled that it was not competent for him to prove these facts.

To the above rulings the plaintiffs excepted.

J. A. Loring, for the plaintiffs, cited *Collyer on Part.* (3d Am. ed.) 75, 76; 1 Greenl. on Ev. §§ 197, 199; *Clarges v. Forster*, 13 East, 405; *Commonwealth v. Call*, 21 Pick. 515, 522; *Thayer v. White*, 12 Met. 343; *Commonwealth v. Eastman*, 1 Cush. 189, 215; 1 Greenl. Ev. § 201; *Goodhue v. Hitchcock*, 8 Met. 62; 1 Phillips Ev. 83; *Thommon v. Kalbach*, 12 Serg. & Rawle, 238; *Morisey v. Bunting*, 1 Devereux, (N. C.) 3; *Commercial Bank v. Eddy*, 7 Met. 181; *Commonwealth v. Kenny*, 12 Met. 235.

H. Jewell, for the defendant, E. W. Woodman, cited 3 Stark. Ev. 1750, 1751; 1 Phillips Ev. 304; 1 Greenl. Ev. § 467, and authorities cited under second point; 1 Stark. Ev. 195, 198.

BIGELOW, J. This is an action of assumpsit, to recover the amount of a promissory note, dated October 26, 1848, signed "L. F. Woodman & Company." The plaintiffs claimed to recover against L. F. Woodman and E. W. Woodman, the two defendants, upon the ground that they were copartners in business, at the time the note was given, under the firm of L. F. Woodman & Co. No service was made on L. F. W., and the only question tried before the jury was, whether, at the time aforesaid, E. W. Woodman was a copartner, and so liable on the note. Various exceptions were taken to the rulings of the judge at the trial, all of which relate to the competency of evidence.

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1. The plaintiffs sought to prove, that, in the summer of 1848, and until I. F. Woodman commenced business under the firm of I. F. Woodman & Co., his credit in the market was bad. This testimony was rejected by the judge, and we think rightly; because it had no tendency to prove the issue before the jury, and was entirely irrelevant. The credit of I. F. Woodman had no bearing on the question of the liability of E. W. Woodman as a copartner.

2. The judge also rightly rejected all the statements made by the witness, Thurston, to the plaintiffs, as to the connection of E. W. Woodman with I. F. Woodman; and all inquiries made by the plaintiffs of Thurston, as to the credit of said firm and the persons of whom it was composed; and also all the statements made by I. F. Woodman to Thurston, and by him repeated to the plaintiffs; because no proper foundation was laid to render such evidence admissible as against E. W. Woodman. The authority of Thurston and of I. F. Woodman to bind E. W. Woodman by their statements and declarations, depended entirely upon the existence of the copartnership. Until that was proved, E. W. Woodman was not shown to have had any connection with either of them; and, as that was the very point in controversy before the jury, to be determined by their verdict, evidence which could be admissible only upon the assumption of the existence of the copartnership, was clearly incompetent, when offered to prove the fact upon which its competency depended. 1 Greenl. Ev. § 177; Collyer on Part. 454; *Tuttle v. Cooper*, 5 Pick. 414 *Robbins v. Willard*, 6 Pick. 464.

3. So, too, the question put by the plaintiffs to their witness, Thurston, upon his reëxamination, in relation to a conversation between him and I. F. Woodman, was properly excluded; because it does not appear that any such conversation was inquired into by the defendants on cross-examination.

4. The next exception is founded on the refusal of the judge to admit in evidence a former judgment between the same parties, in which the plaintiffs recovered against the same defendants, as copartners, upon a promissory note

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signed I. F. Woodman & Co., bearing date December 2, 1848. We consider the rule well settled in this commonwealth, that, to render a former judgment between the same parties admissible in evidence, in another action pending between them, it must appear that the fact sought to be proved by the record was actually passed upon by the jury, in finding their verdict in the former suit. It is not necessary that it should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled, in the suit in which the former judgment is offered in evidence. And parol evidence is admissible to show that the same fact was submitted to, and passed upon by the jury, in the former action; because, in many cases, the record is so general in its character, that it could not be known, without the aid of such proof, what the precise matter in controversy was, at the trial of the former action. *Standish v. Parker*, 2 Pick. 20; *Parker v. Standish*, 3 Pick. 288; *Parker v. Thompson*, 3 Pick. 429; *Spooner v. Davis*, 7 Pick. 147; *Eastman v. Cooper*, 15 Pick. 276, 280. Applying these well-settled principles to the case at bar, it will be found that the judgment offered in evidence by the plaintiffs falls clearly within them, and ought not to have been excluded by the judge. The fact which the plaintiffs sought to prove was, that a copartnership existed between I. F. Woodman and E. W. Woodman, under the name of "I. F. Woodman & Co.," in December, 1848, at the time the note in suit was given. This was the very fact in dispute between the parties at the trial. The judgment, which was offered in proof of this fact by the plaintiffs, was recovered by them against the same defendants, doing business under the same firm, as copartners, and upon a note of hand, which they offered to show was given at the same time with the note in suit. The fact of copartnership, in December, 1848, was the fact to be proved. It was essential to the finding of the former verdict, without proof of which it could not have been recovered. It is, therefore, admissible in evidence, though not conclusive, when the same question is again to be

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tried between the same parties. The principles laid down and illustrated in *Eastman v. Cooper*, *ubi supra*, are decisive of this point, and render further argument and authority unnecessary.

5. The remaining exception is founded on the rejection of a letter offered in evidence by the plaintiffs, written by Thurston, the agent of I. F. Woodman & Co., to the defendant, E. W. Woodman. We think it very clear, that this letter would have been incompetent to affect E. W. Woodman, were it not for the conversation respecting it between him and Thurston, in Boston, which was proved by the plaintiffs. There is a marked distinction between acquiescence in the verbal statements of others, and the omission to answer letters written to a party by third persons. *Commonwealth v. Eastman*, 1 Cush. 189, 215. The former renders the statements admissible, while the latter does not make the letters competent evidence. But, upon a consideration of the subject-matter of this letter, the circumstances under which it was written, as stated to E. W. Woodman, the information which it conveyed to him, that his name and credit were being used in the firm of I. F. Woodman & Co., the direct application which it contains to him, to give a reply, together with the subsequent conversation with Thurston, in regard to the letter and its contents, accompanied by a refusal, on the part of the defendant, to admit or deny the fact of his copartnership with I. F. Woodman, we are of the opinion that it does not come within the rule excluding letters which a party has omitted to answer, and that it was competent evidence to be submitted to the jury, in connection with the other testimony relating to it. It falls within the rule which renders competent all admissions arising, or fairly to be inferred, from the acquiescence of a party.

Exceptions sustained.

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JAMES DERBY vs. MILTON H. SANFORD.

A. and B. entered into an entire contract, by which B. was to do a specific piece of work for A. Before it was completed, B. addressed to A the following note: "I hereby authorize R. R. to finish the job already commenced . . . and to take the balance, whatever may be due;" and A. indorsed thereon, "Whatever balance may be due on the within job, when completed, as per agreement, shall be paid to R. R." B. subsequently brought an action against A. on the contract, in his own name, and it was held that the action could not be maintained.

THIS was an action of assumpsit, brought for the benefit of Ransom Reed, tried before *Wells*, C. J., in the court of common pleas. The facts sufficiently appear in the judgment of the court.

H. Jewell, for the plaintiff.

F. B. Crowninshield, for the defendant.

SHAW, C. J. This was an action of assumpsit, brought by the plaintiff for the benefit of Ransom Reed. It contained, besides the common money counts and a count upon an account annexed, a count upon a special contract, to put into the defendant's mill a steam-boiler and certain fixtures, for a certain price to be paid to the plaintiff. The case was referred to an auditor, who reported that the defendant claimed that the work was done under a special contract, that the plaintiff offered evidence to show that the work was done, so far as it could be at the time; that it was delayed at the special request of the defendant; and that the remainder was done at a subsequent period. The defendant offered evidence to show that the job had never been completed. The auditor found due, from the defendant to the plaintiff, two hundred thirty-seven dollars thirty-seven cents, with interest from September 9, 1848. He reported that the following paper, dated August 8, 1848, from Derby to Sanford, was put into the case.

"Dear Sir: I hereby authorize Ransom Reed, Esq., to finish the job already commenced, of putting the pipes into your mill, and to take the balance, whatever may be due."

And that the following was indorsed thereon by the defendant, under date of November 24, 1848.

"Whatever balance may be due on the within job, when completed as per agreement, shall be paid to R. Reed, Esq."

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The defendant contended that the above paper contained an assignment of the cause of action, and an assent thereto by the defendant, and a promise by him to pay the debt to Reed; and that no suit could be maintained in the name of the plaintiff, but only in the name of Reed. At the trial in the court of common pleas, the plaintiff contended, that, if an assignment were proved, it would not defeat the present action; that the facts reported did not prove an actual assignment of the claim, and an assent thereto and promise to pay the money due, and to become due thereon, to Reed.

The judge ruled that, if the facts of an assignment for a valuable consideration and of the assent and promise of the debtor were disputed, the question would be left to the jury; but that, if these facts were proved, the present plaintiff could not recover.

The plaintiff then offered to prove that the interest of Reed in this suit was, to hold the proceeds of the same as collateral security for a debt due from the plaintiff, which debt was much less than the amount allowed by the auditor, and that the surplus was to be paid over to the plaintiff.

The judge ruled that these facts, if proved, would not enable the plaintiff to maintain the action in his own name.

The jury returned a verdict for the defendant.

To these rulings of the court the plaintiff excepts.

It is to be regretted that this action must turn upon a mere point of form; but still, it is so, and that point must be decided. It seems to us clear, that the decision of the court of common pleas was right. The doctrine of the assignment of *choses in action* does not arise here. There is no doubt that it is the law that, when an assignment of a debt is made, and the debtor agrees to pay the assignee, the assignment is a good consideration for the new promise, and an action may be maintained in the name of the assignee. It follows that, if the debtor pays the assignee, such payment is a good defence to any action by the assignor. There are several cases to this point. That of *Mowry v. Todd*, 12 Mass. 281, is the leading one.

But this case is very different from those. Here, there was

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an entire contract to do a specific piece of work. It was unfinished when a new arrangement was made by consent of all parties, and no cause of action had then arisen. The effect of the written order drawn by Derby, and assented to by Sanford by his indorsement upon it, was that of an agreement by the original contracting parties, to substitute Reed for Derby both to finish and complete the job, and to receive whatever balance might be due on the job, when completed; that is, whatever might be due on the contract, as well for the work already partly done by Derby, as that contemplated to be done by Reed, to complete it. It was not the assignment of a *chose in action*, for there was no debt due to Derby, and, of course, no *chose in action* to be assigned. It was the substitution of Reed for Derby, as the contracting party with Sanford, to which Reed assented by taking the order, and going on to complete the work.

The defendant, by his indorsement on the order, undertook that the balance for the job, when completed as per agreement, should be paid to Reed.

The completion of the job by Reed was a good consideration for such express promise; but in addition to that, the defendant, by the substitution, was wholly discharged from his contract to pay Derby anything. When the job was completed, we think Reed was the only creditor; and he alone could bring the action. The court are of opinion that the directions of the judge were right.

It is finally urged, that substantial justice is here with the plaintiff, and no merely technical objection should be allowed to defeat the action. This may or not be so; we can know the circumstances only as they are disclosed. Possibly, the defendant may have a good bar to any action to be brought by Reed.

It is to be regretted that so much cost has been incurred for a mere point of form, if in truth it be such; but we think that the objections of the defendant were made early, and adhered to perseveringly; and, the law being in his favor, he has a right to the benefit of them.

Exceptions overruled and judgment for the defendant upon the verdict.

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ALBERT H. W. COOK & another vs. FREDERIC CASTNER & another.

WILLIAM JORDAN & another vs. JOSEPH D. FARREN & another.

If a plaintiff excepts to the ruling of the judge, and afterwards amends his declaration changing the form of the action, and the issue to be tried, and the defendant obtains a verdict on the merits, the exception taken is no longer open to the plaintiff.

A shipwright who has examined a decayed vessel may give his opinion, founded on the condition of the timbers at the time of his examination, whether a person could have removed a part of the "thick streak" some months before, without discovering that the timber under it was decayed.

The general rule, that, where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated, is not applicable to the case of partners who are responsible for each other's statements in regard to their joint transactions.

In two cross-actions tried together, one for the price of property sold, and the other for fraud in the vendor, the jury, if they find the fraud, and that the damages equalled or exceeded the purchase-money, may render a verdict for the defendant in the first action, and for the plaintiff in the second action for the excess of such damages, if any, over the purchase-money. If the damage is less than the price sued for, it should go in reduction of the price in the first action, and the verdict should be for the defendant in the second action.

Partiality and misconduct of a juror in the jury-room cannot be shown by the testimony of the juror himself or of the other jurors.

It is not every mere cause of challenge, which, if made at the time, would set aside a juror, which is sufficient ground, afterwards, to set aside the verdict.

THESE were two cross-actions between the same parties, and arising out of the same transaction.

The first was an action of assumpsit with the money counts, to recover back the purchase-money of the barque Averou, sold by the defendants to the plaintiffs.

At the sale there was no warranty, but the sale was made under representations as to the condition of the timbers and fastenings of the vessel. After the sale, the plaintiffs had the vessel examined, when they found some of the timbers unsound; they attempted to repair these, and, in doing so, made further discoveries as to the condition of the timbers and fastenings, and immediately offered to return the vessel to the defendants.

At the trial, in the court of common pleas, the plaintiffs

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introduced evidence that, with the defendants' knowledge, they bought on the faith of these representations; that the representations were materially false, and were known to be so by the defendants at the time they were made.

The defendants refused to receive the vessel, and contended that this action would not lie, inasmuch as the mechanics employed by the plaintiffs to make repairs, after the sale, had a lien on the vessel for their labor, at the time of the return, by force of the statute of 1848, c. 290. The plaintiffs admitted that such lien existed by law, but offered to prove that the labor of the mechanics was for the purpose of putting the vessel in the condition in which she was fraudulently represented to be at the time of the sale; that this work was stopped, as soon as the extent of the defects was ascertained; that the plaintiffs employed the mechanics on a personal contract only, and were personally liable to them for their charges; that no lien or security on the vessel was given in terms, or alluded to in the contract between the plaintiffs and the mechanics; that the plaintiffs had not refused to pay the bills of the mechanics, nor had the mechanics demanded payment of their bills of either party, or made any attempt or offer to enforce their lien, at the time of the offer to return. It further appeared that, after the offer to return, the plaintiffs did no further acts of ownership, and the mechanics libelled the vessel in admiralty, to enforce their lien, and the vessel was sold by a decree of that court, neither of the parties to this suit appearing as claimants.

The presiding judge, *Wells*, C. J., ruled that, under no state of the evidence, could the plaintiffs return the vessel and maintain this action, if the mechanics, at the time of the return, had, in fact, a lien on the vessel, which they had a legal right to enforce. To this ruling the plaintiffs excepted.

Afterwards, the plaintiffs amended their declaration, by altering their action to an action for deceit, in which the verdict was for the defendants on the merits.

The second of these actions was *assumpsit*, brought to recover the balance (part having been paid in cash) of the purchase-money of the barque *Averon*, sold by the plaintiffs

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to the defendants, in Boston, on the 20th of February, 1849, under a written agreement of that date. It was tried with the former action.

The defendants pleaded the general issue, and filed a specification of defence, alleging, 1st, a warranty of the soundness and thorough fastening of the vessel, and a breach of the warranty; 2d, fraudulent misrepresentations in regard to the condition, soundness, and fastenings of the vessel; 3d, that the vessel was worth less than the defendants had already paid for her, and they had abandoned the purchase and returned her to the plaintiffs.

The plaintiffs proved the agreement and sale, and rested their case.

The defendants introduced the evidence of the broker who negotiated the sale on the part of the defendants, to show the circumstances of the sale and the representations made. Among other representations, there was evidence that Castner, one of the owners, and agent of the others, and ship's husband, stated, prior to the sale, that Jordan, a co-owner, told him that he had examined, repaired, and bored the vessel, fifteen months previously, and found her sound; and that, at the time of the repairing, he had put in a new piece of the thick streak; but of which Castner knew nothing of his own knowledge, and referred them to Jordan, then in Boston.

The defendants next called Enos Holbrook, a shipwright, who was employed by the defendants, at the time of their purchase, to repair the vessel in Boston, and fit her for a voyage to California; and he testified to the general defective state of the vessel. The defendants asked the witness, whether, in his opinion, judging from the condition of the timbers, as seen by him, in March, 1849, it would be possible for a man to have taken off a piece of the thick streak and replaced it with new, fifteen months before, without discovering that the timbers under it were decayed. The plaintiffs objected to the competency of the question, but it was admitted by the judge, on the ground that it was a proper question to an expert. To this ruling the plaintiffs excepted.

The defendants having introduced the above evidence, that

Castner represented that Jordan had informed him that he had examined, bored, and repaired the vessel, fifteen months prior to the sale, but of which he knew nothing of his own knowledge, and having shown that Castner, at the time of making the statement, had referred them to Jordan, who was then in town; and it being proved that the defendants, thereupon and prior to the purchase, had an interview with Jordan, the plaintiffs requested the judge to instruct the jury, that the burden of proof was on the defendants, to satisfy the jury, 1st, that Jordan made the statements alleged by Castner to have been made; 2d, that the statements, if any, made by Jordan, were fraudulent. The plaintiffs also requested the judge to instruct the jury that, when Castner, one joint-owner, and the agent of the others, innocently states a fact not of his own knowledge, and as told to him by Jordan, another joint-owner, and, at the same time, refers the party to Jordan, who is thereupon seen by them, Castner is not responsible for the truth of such fact.

On these points, the judge instructed the jury, that, if Jordan had not made these statements to Castner, Castner was guilty of a fraud in stating to the defendants that he had made them, but that the legal presumption was that Castner told the truth, when he stated that Jordan had made these representations; that, if the jury were satisfied that Jordan made these representations, it was for them to determine, from the evidence, whether the representations were false and fraudulent, or not, and that the burden of proving the fraud was on the defendants.

The judge further instructed the jury that if Jordan, being part-owner of the vessel, employed Castner to sell her, and made these representations to him, and authorized him to repeat them to persons treating for the purchase of the vessel, and Castner, acting on this authority, did make these representations to the defendants, as an inducement for them to make the purchase, the plaintiffs were, in law, responsible for their representations so made and repeated, in the same way as if they had been made directly by Jordan to the defendants,

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although Castner was innocent of any fraudulent intent, and believed that Jordan's representations were true.

The judge further instructed the jury that if, at the interview between Jordan and the defendants, Jordan made a correct representation of the appearance of the vessel at the time of her repair, the plaintiffs would not be affected by the statements of Castner.

The law of fraud, as applicable to this case, was fully laid down by the judge, and the instructions on this head were not objected to by the plaintiffs.

The defendants having brought a cross action on the case, for deceit in the sale of the vessel, to recover damages, the plaintiffs objected to any evidence being given in this suit, to avoid the contract, or reduce the damages on the ground of fraud, contending that the defendants were not entitled to avoid the contract or reduce the damages in that action, and also sustain their cross action, but must elect one or the other remedy. But the judge ruled that the defendants might give such evidence in the plaintiffs' action, to avoid the contract, or reduce the amount claimed by the plaintiffs to the extent of that amount; and that, if the damages sustained by the defendants, by the fraud and misrepresentations, exceeded that sum, the defendants might recover such excess in their cross action; but, by setting up this defence, they precluded themselves from recovering any thing but such excess in their action.

To this ruling the plaintiffs excepted.

The jury found a verdict for the defendants, and the plaintiffs moved for a new trial, for the following reasons, to wit:—

1st. Because Mr. Ballard, one of the jurors by whom the verdict therein was rendered, had, prior to the time of the trial, examined the barque Averon, the subject of that suit, about the time of her abandonment by the defendants, and had then formed an opinion of the condition of the vessel at the time of her sale to the defendants, and was not an unprejudiced and unbiassed juror, and was thereby rendered incompetent as a juror in the cause.

2d. Because Ballard, after the cause was committed to the jury, and before the verdict, stated to his fellow-jurors, not in the presence of the judge, and not as a witness under oath, that he had "examined the vessel and knew all about her" that she was more rotten than she was proved to be at the trial, and that she was rotten throughout; that he would bet five hundred dollars that, if she were opened now, it would be found that she was rotten in places where one of the plaintiffs' deponents said he had found her sound when he repaired her; for he, Ballard, saw rot in those places when he looked at her."

All which matters and things were unknown to the plaintiffs until after the verdict was rendered; whereby the plaintiffs were prejudiced, and suffered manifest wrong and injury by the improper conduct of the juror. And the plaintiffs prayed that the verdict in the cause might be set aside, and a new trial ordered.

On the hearing of this motion, the plaintiffs offered to prove, by Ballard and by the foreman of the jury, the truth of the facts stated in the motion for a new trial, in respect of Ballard; but the presiding judge ruled that the testimony of these witnesses could not be received; that the jurors were not competent witnesses to prove the facts stated in the plaintiffs' motion for a new trial, it appearing that the plaintiffs proposed proving that these statements were made while the jury were together, deliberating upon the verdict they should render.

To this ruling the plaintiffs excepted.

W. Dehon, for the plaintiffs, in the second, and the defendants in the first action, cited *Jameson v. Drinkald*, 12 Moore, 148; *Sills v. Brown*, 9 Carr. & P. 601; *Jefferson Insurance Co. v. Cotheal*, 7 Wend. 72; *Farar v. Warfield*, 8 Martin, (N. S.) (20 La. R.) 695; *Harger v. Edmonds*, 4 Barb. R. 256; *Stone v. Denny*, 4 Met. 151.

R. H. Dana, Jr., for the defendants, in the second, and the plaintiffs in the first action, cited *Bridge v. Eggleston*, 12 Mass. 245; *Dorr v. Fenno*, 12 Pick. 521; *Hannum v. Belchertown*, 10 Pick. 311; *Murdock v. Sumner*, 22 Pick. 156; *Meade v*

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Smith, 13 Conn. 346; *Clugage v. Swan*, 4 Binney, 150; *Clum v. Smith*, 5 Hill, 560; *Brownell v. McEwen*, 5 Denio, 167; *Tenny v. Evans*, 13 N. H. 462; *Vaise v. Delaval*, 1 T. R. 11; *Owen v. Warburton*, 1 New Rep. 326.

The plaintiffs cannot prove the bias of a juror, if they failed to interrogate him on the *voir dire*. *Commonwealth v. Flanagan*, 7 W. & S. 415; *Simpson v. Pitman*, 13 Ohio, 365; *Billis v. The State*, 2 McCord, 12; *Vennum v. Harwood*, 1 Gilman, 659.

SHAW, C. J. These two cases, as we understand, are cross actions between the same parties, although the names and titles of the causes are different, being controversies arising out of the same transaction, the purchase and sale of a vessel, called the barque *Averon*, in which Castner and Jordan were the vendors, and Cook and Farren the purchasers. They were both tried together, and went to the same jury, and verdicts in both were rendered at the same time.

The first was a suit brought by Cook and Farren, the buyers of the vessel, to recover back part of the purchase-money, paid in cash as part of the price, on the ground that, by means of false representations made by the defendants, the plaintiffs had been deceived, in consequence of which they claimed a right to rescind the contract, as well to exempt themselves from the payment of the residue of the purchase-money, as to recover back that part of the purchase-money which had been paid; and the plaintiffs insisted that, in the exercise of this right to rescind, they had offered to return the vessel to the defendants.

The defendants objected to this offer, if, in other respects, the buyers had a right to return the vessel and rescind the contract, because, as they alleged, before this offer was made, the vessel had become chargeable with a *lien* to workmen and material men, for labor and materials in making repairs, and, therefore, that the defendants were not bound to take back the vessel, till this burden was removed. The judge, on the trial, decided this point in favor of the defendants, to which the plaintiffs excepted. In point of fact, it appeared

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that, when this offer of the plaintiffs to return the vessel, and the refusal of the defendants to accept such offer, were made, the mechanics had libelled the vessel in the admiralty for these repairs, and, neither of the parties appearing to claim the vessel, they had a decree for a sale.

After this decision of the judge, in regard to the *lien* of mechanics, and holding that, there being such a *lien*, created by the acts of the defendants, the plaintiffs could not return the vessel and rescind the contract until it was removed, the plaintiffs obtained leave to amend, and amended their declaration, so that, instead of *assumpsit* to recover money paid on a consideration which had failed, it was changed to an action on the case for a deceit, in making sale of the vessel under false representations. Upon that issue, the defendants had a verdict on the merits.

The plaintiffs now propose to sustain their exceptions, taken before the amendment, and show, either that the mechanics had no *lien* on the vessel, or that, if they had, it did not prevent their offer to return the vessel from being sufficient. But it seems obvious that, by changing the form of action and changing the issue, that direction, whether right or wrong, has become immaterial. The plaintiffs voluntarily changed their form of action, and placed their case on the ground on which they chose to try it. The first action went on the ground of rescinding the contract, disaffirming the contract, and recovering back part of the consideration, to which a restoration of the vessel was necessary. The action, after the amendment, was one for a deceit in the sale, for damages caused by the deceit, the plaintiffs, as vendees, retaining the vessel as their own property. This exception, therefore, is not now open for the plaintiffs.

The second action between the same parties was brought to recover about \$7,000, the balance of the purchase-money for the barque *Averon*, sold by the plaintiffs to the defendants, a part of the purchase-money having been paid at the time, and being the subject of the cross action just disposed of. The action was defended, on the ground that the vessel was sold under a warranty or representation of soundness, which was false.

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No warranty was proved, and the case went to the jury upon evidence of false representation, by which the defendants were deceived.

1. The first exception taken by the plaintiffs, and it is equally applicable to both cases, was founded on the admission of a question to Holbrook, who was employed by the defendants to repair the vessel, soon after the sale to them, and who had testified to the general defective state of the vessel. Some evidence had been given by the defendants of a representation by the plaintiffs, that one of them, Jordan, about fifteen months before, had taken off a piece of the "thick streak," and examined the timbers by boring, and found them then sound.

The witness was asked whether, in his opinion, judging from the condition of the timbers when he saw them, it would be possible for a man to have taken off a piece of the thick streak, and replaced it with new, fifteen months before, without discovering that the timber under it was decayed. The question was objected to, but admitted by the judge.

It appears to us, that this was a proper question to an expert. It embraced several questions, involving skill and experience to judge of. It was, in effect, taking the condition of the timber as he then found it, in point of decay, whether or not that decay could have commenced and reached the stage at which he found it, in fifteen months, and, if not, whether its actual condition could have been discovered by taking off and replacing a piece of the thick streak. This might depend on many circumstances; the position of the thick streak, the timbers exposed by taking it off, the nature of the timber, whether subject to slow or rapid decay, the effect of the action of tools on the timber, all which are conclusions not within common experience, but of which an experienced shipwright could best judge. It must depend upon several minute facts, not capable of being described in words, so as to enable a jury to draw a conclusion from them, but upon which a skilled person could readily draw a conclusion, and this must be in the form of an opinion. It is difficult to lay down a definite rule in regard to evidence of

opinion, with its precise limitation. Much must depend on the particular circumstances, and the nature and state of the inquiry. Of course, a witness cannot be allowed to express an opinion on the general merits of the case. The fitness of the question, in any particular case, may, in some measure, be judged of, by keeping steadily in view the principle on which it is founded, which is, that men long devoted to a particular art, or science, or branch of business, having a larger and fuller experience, may safely draw inferences from facts, witnessed themselves, or testified by others, which could not be drawn even by men of sound judgment, with common experience in the ordinary affairs of life, but not trained and practised in the science, art, or business, respecting which the question arises.

2. The next exception arises out of evidence, tending to show that Castner, one of the owners, and agent of the others, and ship's husband, stated, prior to the sale, that Jordan, a co-owner, told him that he had examined, repaired, and bored the vessel fifteen months previously, and found her sound, and that, at the time of said repairing, he had put in a new piece of the thick streak; but of which Castner knew nothing of his own knowledge, and referred them to Jordan, then in Boston.

It appeared that the defendants, subsequently and before the sale, did have an interview with Jordan, but there was no evidence of what took place there.

The plaintiffs, thereupon, requested the judge to instruct the jury, that the burden was on the defendants to satisfy the jury,

1st. That Jordan made the statements alleged by Castner to have been made.

2d. That the statements, if any were made by Jordan, were fraudulent.

And they also requested the judge to instruct the jury that, when Castner, one joint owner and the agent of the others, innocently states a fact not of his own knowledge, and as told to him by Jordan, another joint owner, and, at the same time, refers the party to Jordan, who is thereupon seen by the

defendants, Castner is not responsible for the truth of said fact.

Now, neither party having shown what took place at the interview with Jordan, it is exactly as if it had never taken place. It is true, ordinarily, that where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated; but this rule is subject to some modification. The circumstances which modify it here are, that one partner states what was told him by another. He was either so informed by his partner, or he was not. If he was so informed, then the representation was made by Jordan, and bound his partner. If he had not been so informed, then he made a false representation himself, and that bound Jordan. Referring to Jordan did not take away the effect of Castner's statement, for they were joint owners, engaged at the time in the joint undertaking respecting which the representations were made, and they were equally responsible for each other's statements in regard to it. This is substantially the effect of the instructions given by the judge upon the last point.

The instruction requested upon the first point was denied, for the same reason. Castner referred to a person, for whose representations he was responsible as for his own. The instruction was right, with this slight modification. The court of common pleas ruled, that the legal presumption was, that Castner spoke the truth when he stated the representations to have been made by Jordan. The decision was right, but the true ground of it is, that Castner was equally responsible with Jordan.

The other instructions of the judge, that if Jordan authorized Castner to make these representations, and Castner innocently did make them to the defendants, the plaintiffs were responsible to the same extent as if they had been made to the defendants directly by Jordan; and that if, at the interview between Jordan and the defendants, Jordan made to them a correct representation of the appearance of the vessel at the time of the repairs, the plaintiffs would not be affected by said statements of Castner, were sufficiently favorable to the plaintiffs, and they could take no exception thereto.

3. One other objection taken by the plaintiffs in this action was, that the defendants, having brought their action for damages for the alleged deceit, could not use the same evidence to reduce the purchase-money, by way of defence to this action; and they objected to any evidence being given of the fraud, contending that the defendants must elect between the two remedies.

As to the right thus to set off damages arising from deceit in the same transaction, in an action brought to recover the price, the rule formerly acted upon was, that a false warranty or false representation could not be used in any way to reduce the agreed price, but the party entitled to recover damages must bring a cross action for the deceit. But, by the rule more recently adopted, in order to avoid circuity and multiplicity of suits, the parties and the transaction being the same, the defendant is permitted to give the same evidence in defence, to reduce the damages recoverable against him, as would enable him to recover in an action of tort. *Harrington v. Stratton*, 22 Pick. 510.

Still, it is very clear, that the party claiming damages for the deceit can have but one satisfaction; and, had not these two actions been tried together, and submitted to the same jury, at the same time, with instructions as to damages applicable to both, there would have been some weight in the objection.

But they were tried together, and the judge directed the jury, first, to find whether any fraud had been practised by the sellers of the vessel, and, if so, what were the damages, and to allow no more, in either or both actions, than the amount of damages actually sustained. If it equalled or exceeded the balance due for the purchase, then the defendants in this action would be entitled to a general verdict, and, as plaintiffs in the other action, be entitled to a verdict for the excess, if any. If damage was sustained, but less than the balance of the purchase, it would go in reduction of the amount due the plaintiffs for the purchase, and they would be entitled to a verdict in this suit for the difference, and, as defendants, to a general verdict in the other action. These

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directions, we think, were correct in principle, and tended to do justice between the parties, as if the actions had been tried separately; and, therefore, we can perceive in them no ground for setting aside the verdict.

4. As to the juror, the offer of the plaintiffs was only to show what took place in the jury-room, at the time the jury were in deliberation on their verdict. It was, that the juror stated that he had examined the vessel before the trial, that he was of opinion that she was very rotten, and so stated to the rest of the jury.

We think the judge was right in rejecting evidence of the alleged partiality and misconduct of a juror in the jury-room, by the testimony of the juror himself, or of the other jurors. It is a rule, founded upon obvious considerations of public policy, and it is important that it should be adhered to and not broken in upon to afford relief in supposed hard cases.

A verdict, as the name imports, (*verdictum*,) is taken, in theory of law, to be absolute truth, and it is important that it be so regarded. All communications among the jurors are confidential; they are intended to be secret, and it is best they should remain so. It is very probable, indeed it is almost inevitable, that many things should be said and views expressed, by individual jurors, which not only have no influence on others, but which they themselves do not ultimately adhere to and act upon.

It first occurred to us, to see whether the evidence offered would not be sufficient to show that the juror was disqualified, by bias and prejudice, from acting as a juror, when the jury was impanelled, by his own testimony; and whether, if this was not known to the party now offering the evidence, the verdict might not be set aside on that ground. But, in looking at the evidence of all that took place before the jury was impanelled, it would appear that the juror knew the vessel before, and had examined her, and yet it would not follow that he was under such bias or prejudice as not to be governed by the evidence given on the trial, and the directions of the judge in matters of law, or so as not to stand indifferent between the parties, within the meaning of the law. It is

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not every mere cause of challenge, which, if made at the time, would set aside a juror, which is sufficient ground, afterwards, and after a fair trial, to set aside the verdict. The motion on this ground is not sustained.

Judgment, in each case, on the verdict for the defendants

OTIS JACQUINS vs. THE COMMONWEALTH.

The St. 1851, c. 87, relates to writs of error on past as well as future judgments, and such a construction does not make it an *ex post facto* act.

SHAW, C. J. Three writs of error are brought in the present case, to revise, and, if erroneous, to reverse and set aside three judgments, rendered against the plaintiff in error, by the court of common pleas, held at Lenox, March Term 1850.

The error assigned is, that the plaintiff was charged in three several indictments, for passing and uttering counterfeit bank bills, and was convicted on each, and sentenced to a distinct term of imprisonment on each, amounting in the whole to a term a little over eight years, when, by force of Rev. Sts. c. 127, § 7, a consolidated judgment should have been rendered on the three convictions, that he should be deemed a common utterer of counterfeit bills, and sentenced to a term of imprisonment in the state prison, not exceeding ten years.

In an analogous case of convictions on three indictments for larceny, at the same term, the only and regular legal judgment was, the consolidated judgment and sentence to one term of imprisonment. *Haggett v. Commonwealth*, 3 Met. 457.

We have heretofore decided in a similar case, that, upon the reversal of a judgment in a criminal case, the court here had no authority, at common law, to enter a new judgment, such as the court of common pleas should have rendered. *Shepherd v. Commonwealth*, 2 Met. 419.

This point, whether supported by precedent or not, has become of less importance since *St.* 1851, *c.* 87, upon the right construction of which this case must be decided. It provides as follows :—

“ Whenever a final judgment in any criminal case shall be reversed by the supreme judicial court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had.”

It was very fully argued by the plaintiff's counsel, that this act cannot be construed so as to affect the plaintiff, without being construed to be a retrospective act, and that such a construction would be opposed to the true principles of the constitution, and to all the great maxims of justice and proper legislation. We must, then, consider what the provisions of this act are. They relate simply to errors in the imposition of sentences, in cases where neither the law, nor the evidence upon which the convictions rest, is in any respect impugned, where the original process is right, the facts sufficient and regularly proved, and all the proceedings, up to the sentence, were right, and where the alleged error is in the sentence only. Now is this act retrospective or prospective? It certainly refers in its terms to the future, and to writs of error thereafter to be brought. It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party, to provide that he may come into court upon the terms allowed by this statute, than to exclude him altogether. This act operates like the act of limitations. Suppose an act were passed, that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies.

The argument assumes that this act is retrospective, and then it is attempted to support it by a great many authorities, which go very strongly to show, that retroactive acts are contrary to the first and most deeply laid principles of legislation, and of common right. But these authorities apply chiefly to two well-defined classes of cases; 1st, to *ex post facto* laws, and 2d, to laws passed to take away rights existing and vested at the time of their enactment. It will not do to call an act retroactive, and then to produce the opinions of statesmen, historians and judges, on the subject of the two classes last mentioned, as proving its unconstitutionality. *Ex post facto* laws are understood to be laws to punish, as criminal or penal, acts which were not criminal, or not offences, at the time they were done, or which, if criminal or penal, were not subject to penalties so high, or to punishment so severe, as those affixed to them by the *ex post facto* law. The reason why these laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive. It is contrary to the fundamental principle of criminal justice, which is, that the person who violates a law deserves punishment, because he wilfully breaks a law, which in theory, he knows or may know to exist. But he cannot know of the existence of a law which does not, in fact, exist at the time, but is enacted afterwards. The cases upon this subject have no bearing upon the one before us.

The other class relates to acts passed to take away existing rights. If they profess to take away or subvert rights actually existing at the time of their enactment, they are unconstitutional. There is a large class of cases, where acts of legislation are passed, to correct errors, and declare valid and give force and effect to the acts and proceedings of corporations and other bodies, and also to officers, in cases of irregularity in such proceedings. The legislature, we believe, has gone so far as to declare marriages solemnized by officers at the time

not qualified by law, though supposed by the officers themselves to be so, duly authorized. These laws are most beneficent in their purpose and design, as statutes of peace, to confirm rights, to give effect to titles, and to remove doubts. The force and effect of such statutes may depend on many circumstances; and cases arising on them must be determined according to their particular merits, as they arise. This class of cases has no bearing on the present.

In the present case the court are of opinion that this act is not *ex post facto*, or retrospective in its legislative action. It relates to future proceedings in writs of error, in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial. In legal effect, it directs that writs of error, in criminal cases, shall only be brought on certain conditions, one of which is, that, if the error is only in the award of punishment, it shall be set right. In this the law is analogous to one in civil cases, which provides, that a judgment shall not be reversed for any formal error, which might have been avoided by amendment. In this we think there is no hardship, and no departure from just principles of legislation. Such a statute has long been demanded, to prevent a palpable failure of justice. Judgments in criminal courts are often passed under a pressure of business, and when there is little time for deliberation; and it would tend to bring the law into disrepute, and impair its efficacy, if criminals acknowledged to be rightly convicted, could escape punishment altogether, by taking advantage of a mere mistake in the sentence.

It is argued that this statute disturbs the symmetry of the common law. That is nothing more than a figurative expression, if it mean that it does more than every other statute does. All statutes are intended to modify the common law to affect remedies and future proceedings of various sorts. The question is, simply, whether it disturbs the fundamental principles of right, and we think it does not. The judgment will be, that the former judgment be reversed, and that, in lieu of the three sentences imposed in the court of common pleas,

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the plaintiff be sentenced to imprisonment for eight years in the state prison, three days of the term to be spent in solitary confinement, and the term to be computed from the time when the first sentence commenced its operation.

J. A. Bolles, for the plaintiff in error.

Clifford, (attorney-general) for the commonwealth.

COMMONWEALTH *vs.* WILLIAM H. DAVIS.

Money sent to a married woman, for the support of herself and her children, by her husband, who has been three years absent at sea, is, in contemplation of law, his property, and must be so averred, when, in pleading, an averment of property is necessary.

THIS was an indictment for cheating by false pretences, tried before *Byington, J.*, in the municipal court of the city of Boston; and the defendant, being there convicted, filed his exceptions, upon which the case came into this court.

The property was alleged, in the indictment, to be of *Abigail Clark*; and there was evidence that she was a married woman, and her husband alive; that he went to sea about three years prior to February, 1851, and was then on the coast of Africa, and had not returned; that he sent the money to his wife, which the defendant obtained from her, for her support and the support of her family; and that he had been in the habit of sending her money, from time to time, for that purpose, she and her family living in Boston. There was also evidence that the defendant applied to her for a loan of the money, obtained it, and gave her his promissory note, payable to her on demand.

The judge instructed the jury that, if they found that, at the time of the transaction set forth, the husband had been absent for three years; was not intending to return soon; and had fixed no time for his return, and had left his wife and family in Boston, without other means of support than those

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supplied by him as before stated, and he sent this money to her to be disposed of as she should choose, without interference or control on his part, and the defendant, in obtaining the money from her, trusted and acted with her as a *feme sole*, and obtained it of her as her money, and gave her his notes, payable to her,—such facts would be sufficient to sustain the allegation that the money was her property.

F. E. Parker, for the defendant, cited 2 Russell on Crimes, 308; *Commonwealth v. Manley*, 12 Pick. 173; *Commonwealth v. Cullins*, 1 Mass. 116.

BY THE COURT. We see nothing in the circumstances mentioned in the bill of exceptions to take this case out of the common rule, that money held by a married woman, for the support of herself and children, is, in contemplation of law, the property of the husband, and must so be averred, when, in pleading, an averment of property is necessary. *Commonwealth v. Manley*, 12 Pick. 173.

Exceptions sustained.

COMMONWEALTH vs. WILLIAM S. KING & another.

Evidence which proves an embezzlement under the statute will not sustain a general charge of larceny at common law.

In an indictment for receiving stolen goods, it is not necessary to state by whom the larceny was committed; but, if alleged to be by A. B., it must be so proved.

If a servant appropriates to his own use bank bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny.

In an indictment against one for a larceny at common law, and against another for receiving the goods so stolen, if the evidence fails to prove the larceny by the former, the charge of receiving the stolen goods cannot be sustained against the latter.

THIS was an indictment, containing two counts, one for larceny of bank bills, belonging to John S. Fowler, and the other for receiving the bills, knowing them to have been stolen. King, one of the defendants named in it, was tried in the municipal court of the city of Boston, before *Perkins, J.*;

and Albion L. Mellen, the other defendant, pleaded guilty generally.

There was evidence that Mellen, the other person named in the indictment, was in the employment of Fowler, as his clerk and servant, and was in the habit of receiving money on checks drawn by Fowler, for Fowler, and doing other business for Fowler, as he was directed; that, on the morning of the eighth day of December, 1851, Mellen received from Fowler a check on the North Bank, in Boston, for fourteen hundred and fifty-seven dollars, with directions to draw the same from the bank, and, with the money received, to take up certain notes of Fowler, then due and payable at other banks in Boston, the money being, at the time, on deposit at the North Bank, in Fowler's name. Some time previous to the eighth day of December, 1851, Mellen and King, having a knowledge that the above check was to be drawn on that day by Fowler, and would come into the hands of Mellen, agreed that they would take the money which should be drawn thereon by Mellen, and appropriate it to their own use; but, on the day before the eighth day of December, in consequence of some fears and misgivings on the part of King, about carrying out some of the terms of the agreement, Mellen supposed that the agreement might not be carried out; and when, on the morning of the eighth, Mellen received the check from Fowler for fourteen hundred and fifty-seven dollars, he was not certain that he should meet King; and if he did not meet him, he expected that he should receive the money and apply it according to Fowler's directions. But, while Mellen was on the way to the bank, with the check in his possession, King met him, and ascertained that he had the check in his possession, and they then proceeded to carry out their original agreement above stated. They went into the building where the bank was, and Mellen went into the bank, while King remained in another room of the building near by. Mellen drew the money and immediately joined King, and gave him four hundred dollars of the money; and they both went off to get the money each had received changed into the bills of other banks, for the purpose of pre-

venting detection and securing the money. They secreted themselves in Boston for a time, and afterwards went to some other place, where they were arrested, and a part of the money found on each was secured.

The defendant, King, contended that the jury had no right to find, on these facts, that a larceny had been committed by anybody, and so they could not convict the defendant on either of the counts in the indictment. But, there being evidence that when Mellen took the check, on the morning of December 8th, he had not the purpose of converting the money to his own use, and nothing to show the contrary, the judge ruled that, although Mellen might have received the check without any positive intent, at the time, to appropriate the money to be received thereon to his own use, yet if, while he had the check in his hands, and was on his way to the bank, he met King, and the two then agreed that Mellen should use the check in pursuance of the previous agreement and combination, as a trick or contrivance to obtain the money of Fowler then in the bank, with the present purpose of appropriating it to his own use; and, thereupon, Mellen and King should feloniously appropriate the money so obtained to their own use, against the will and without the knowledge of Fowler; and Mellen, in pursuance of this agreement and understanding, did use the check as a contrivance for getting Fowler's money out of the bank into his possession, with the above intent, and in the manner agreed, and did obtain Fowler's money thereon, and King received the money in the manner charged and set forth in the second count of the indictment, the jury would be justified, all other facts necessary to constitute the larceny being proved, in finding, on these facts, that the money was taken by larceny, for the purpose of this indictment, in the second count thereof.

The jury found the defendant, King, guilty of receiving four hundred dollars of the money charged to have been received in the second count of the indictment, in manner as set forth; whereupon he alleged exceptions to the above instructions.

O. H. P. Green, for the defendant.

Clifford, (attorney-general,) for the commonwealth.

DEWEY. J. The indictment upon which the defendant was

tried, charged the offence of the prisoner in two forms; first, as a joint larceny at common law, with one Albion L. Mellen; secondly, in a distinct count, a charge of larceny at common law, by Mellen, and that the defendant received and aided in the concealment of the property thus stolen by Mellen, knowing the same to have been stolen. The jury having acquitted the defendant on the first count, the only questions, therefore, now arise upon the conviction of the defendant upon the second count, as receiver of stolen goods. To authorize such conviction, the government must prove the material allegations in the indictment.

The first of these that is to be considered, is the charge of a larceny at common law by Mellen. The government are confined to a larceny at common law, having, by the form of the indictment, thus limited themselves. Evidence tending to prove an embezzlement under the statute, would not sustain a general charge of larceny at common law, as was held by this court in *Commonwealth v. Simpson*, 9 Met. 138. The two offences are by us considered so far distinct, as to require them to be charged in such terms as will indicate the precise offence intended to be charged. It was not necessary to state in the indictment by whom the larceny was committed. *Rex v. Jervis*, 6 Car. & Payne, 156; but, if alleged to be by A. B., it must be so proved. *Rex v. Woolford*, 1 Mood. & Rob. 384.

To prove the larceny by Mellen, the government relied upon the facts stated in the bill of exceptions, as to the manner of his obtaining the bank bills; and the inquiry is, do these facts show a larceny at common law? If the goods are not in the actual or constructive possession of the master, at the time they were taken, the offence of the servant in taking them will be embezzlement, and not larceny. Therefore, when goods in the possession of a third person, and not yet delivered to the master, are delivered to the servant, who appropriates them to his own use, this is not a larceny, for, at the time of the receipt of the goods by the servant, in the case supposed, there was no possession in the master, without which there could be no trespass or larceny. *Roscoe, Evi.* 547; 2 East, P. C. 568.

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But if A. gives a sum of money to his servant, to carry to B., and the servant converts the same, this may be larceny. Thus, in *Rex v. Sullens*, 1 Moody's Cr. Cases, 129, where, upon an indictment for larceny, it appeared that the defendant, being sent by his master to get change for a £5 bank note, obtained silver for it, as he was directed, and subsequently absconded with the silver, it was held not to be larceny, because the silver had never been in possession of the master, except by the hands of the defendant. The principle of this and other English cases of like character shows, that the instruction to the jury, as given in the present case, cannot be sustained.

If the check had been originally obtained of the master by fraud, or subsequently appropriated to the use of the servant, it would only have authorized an indictment for larceny of the check itself. But the present indictment charges larceny of the bank bills obtained at the bank. Those bills had never been in the possession of the master, in any such sense as would authorize him to sue the servant in trespass for them. The bank bills delivered to the servant were not the bills of the master, while in the bank. They were the money of the bank, and, as such, were delivered to Mellen, the servant; and never came to the hands of the master, or were held by him. It is just the case that, under the authorities cited, constitutes embezzlement of the bank bills, as in *Rex v. Walsh*, Russ. & Ryan, 215.

Stating the principle to be that, when the goods have never been in the master's possession, but have been delivered to the servant for the master's use, and the servant, instead of delivering them, converts them to his own use, this is not a felonious conversion at common law. Wharton's Crim. Law, 405, *et seq.* The cases, it is true, are not entirely uniform on this point, some of the earlier cases sanctioning the contrary doctrine, but the preponderance of authority is, that it is not a case of larceny. The error of the presiding judge was in assuming that the bank bills were held by the servant in the same manner, as to the possession of the master, as the check itself, which was not correct.

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The government has failed, therefore, to establish such a larceny as was set forth in the indictment, and in reference to which the defendant was charged with concealing the property stolen.

Having elected to charge the offence in this manner, having based the charge against the defendant as being a receiver of goods stolen by Mellen, by a larceny at common law, it was open to the defendant to insist, that no such larceny was proved as was charged and was made the basis of the charge of receiving and concealing the bank bills by the defendant.

The result is, therefore, that the exceptions are sustained.

Verdict set aside, and a new trial ordered.



ALFRED CHENEY & another vs. EDWARD WHITELY.

A trustee who refuses to deliver on the execution, any goods, &c., of the principal debtor, or to pay any money, is liable to a *scire facias*, although the principal debtor was committed on execution.

METCALF, J. This is a writ of *scire facias*, sued out, pursuant to the Rev. Sts. c. 109, § 38, against a party who was summoned and charged as trustee in a suit by the plaintiffs against W. H. Whitely. Judgment was recovered in that suit, and an execution was issued, in the usual form, against W. H. Whitely, and his goods, effects and credits, in the hands and possession of the present defendant, and was delivered to an officer, who demanded of him such goods, effects and credits; but he refused or omitted to deliver them to the officer, or to pay him any money. The officer afterward committed W. H. Whitely to jail, on the same execution, and he was discharged from imprisonment, on taking the poor debtor's oath.

The defendant is now called upon to show cause why
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judgment and execution should not be awarded against him, and his goods and estate, for the amount of the judgment against W. H. Whitely. And he contends that such judgment and execution ought not to be awarded, because, as he avers, he is discharged from all liability to respond to the original judgment, by reason of the commitment of the principal debtor to jail, on execution. This discharge is claimed on two grounds :—

“1st. That such commitment was a satisfaction of the judgment, by the common law, and is still a satisfaction, except as against the property of the judgment debtor, which may be taken on a new suit against him, according to the Rev. Sts. c. 97, § 59, and c. 98, § 25.

“2d. That the plaintiffs, by electing to commit their debtor in execution, have discharged the present defendant from his liability to them as trustee.”

It is unnecessary to discuss the common law doctrine concerning the effect of the commitment of a debtor in execution. For it has been the law of Massachusetts, ever since debtors were permitted to be discharged from imprisonment on taking the poor debtors' oath, that the judgment against them shall remain in full force, and may be satisfied by levy on their property, after their discharge. And ever since the *St.* of 1788, c. 16, a judgment creditor has been allowed to bring an action on the judgment, and summon a trustee of the debtor, even whilst the debtor is in confinement on execution—discharging him from imprisonment within seven days. So, by *St.* 1819, c. 94, a creditor may discharge his imprisoned debtor, who claims support as a pauper. And so, since *St.* 1821, c. 22, the jailer may discharge a debtor from imprisonment, if the creditor neglects to advance money, or give security for the debtor's support in prison. See Rev. Sts. c. 97 and 98. In all these cases, except when the debtor is convicted of having wilfully sworn falsely when taking the poor debtor's oath, the debtor's body is exempted from a second commitment; but the judgment, by express statute provision, remains a legal claim, which may be enforced against his property. A commitment in execution, therefore, in all these

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cases, is not a satisfaction or discharge of the judgment. It is sometimes called a satisfaction of the *execution*; although, in legal strictness, it would be more proper to say that, by a commitment of the debtor, the execution is *functus officio*.

Nor can the second ground of discharge, taken by the defendant, be maintained. It does not appear whether W. H. Whitely was committed to prison by the direction, consent or knowledge of the plaintiffs; nor is it material. For it has been decided that a receiptor of attached property is not discharged from his contract to redeliver it to the officer, by reason of the subsequent commitment of the judgment debtor in execution; whether that commitment be made with or without the creditor's direction, consent or knowledge. *Lyman v. Lyman*, 11 Mass. 317; *Bailey v. Jewett*, 14 Mass. 155; *Twining v. Foot*, 5 Cush. 512. Those cases are not distinguishable, in principle, from this. In all of them, the receiptors were rendered liable by a seasonable demand on them for a return of the goods. In this case, the defendant was made liable to a writ of *scire facias*, by a demand on him for the goods, &c., of W. H. Whitely, and by his refusal to deliver them, or to pay money, to the officer. And this liability is not discharged by the subsequent commitment of the debtor in execution, any more than a receiptor's liability is discharged by such commitment.

Judgment for the plaintiffs.

E. N. Moore, for the plaintiffs

G. Minot, for the defendant.

JOSIAH QUINCY, JR., Executor vs. JOHN ROGERS & others.

A determination expressed by a testator, in a codicil to his will, to make an alteration in the will in one particular, negatives by implication any intention to alter it in any other respect.

A testator, by his last will and testament, gave to A., B., and C., a legacy of \$2,000 each, and also to each an equal share with others named in the residue of his estate. By a codicil, which recited that his intention in respect to the lega-

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cies to A., B., and C. was not carried into effect by his will, he provided as follows: "I, therefore, in this particular, declare my will to be, that the sum of \$6,000 shall be taken by" A., B., and C., "or those of them who shall survive me, they to share alike; but if all these persons shall die in my lifetime, then the said sum shall sink into the residue of my estate. I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will, and this writing shall be taken as a codicil thereto, hereby ratifying said will in all other particulars;" — and it was held that this codicil did not revoke the residuary gift in the will to A., B., and C.

IN this case, which was a bill in equity, filed for the purpose of obtaining the direction of the court, by the executor of the will of John Bromfield, the material facts, as well as the names of the respondents, are set forth in the opinion of the court.

E. G. Loring, for the complainant, and certain legatees under the will.

W. R. P. Washburn, for certain of the legatees.

J. J. Clarke, for the first-named respondent, Rogers.

SHAW, C. J. This is in the nature of a bill of interpleader. A question having arisen between certain sets of legatees under the will of the late Mr. John Bromfield, in relation to the true intent of the testator, with regard to the residue of the estate, which residue amounts to about \$60,000, the executor has brought all the parties before the court, in order to the judicial decision of the questions at issue. This residue was given by the will to nine persons, including three, whom the rest allege to have been afterwards excluded by the terms of a codicil. The three deny that they are so excluded, and this is the point at issue. This depends so exclusively upon three clauses of the will and codicil, that it is necessary they should be stated.

The first provision in the will, for the three cousins, Mrs. Blanchard, the two brothers, Edward A. Pearson and Henry B. Pearson, is of the following tenor: —

"If my cousin, Edward A. Pearson, shall survive me, he shall be paid two thousand dollars; and the like sum shall be paid to my cousin, Henry B. Pearson; and, if he shall not survive me, his issue shall take said sum.

"I give to my cousin, Mrs. Blanchard, relict of the late Rev.

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Mr. Blanchard, two thousand dollars, which sum shall go to her issue, in case she shall not survive me."

In this clause, there is a difference in the terms of the legacies. The legacy to Edward A. Pearson was on the express condition that he should personally survive the testator; and, therefore, though he might marry and have issue and die, his surviving issue would not take. The case finds that Mr. Edward A. Pearson then was, and still is, a bachelor; making it less probable that he would die leaving issue. This legacy therefore would lapse, in case of his death before the testator. But, in case of the other two, the provision is that, if either should die leaving issue, the issue should take the legacy which the deceased parent would have taken.

The other clause in the original will, which is of importance to the question before us, is this:—

"All the residue of my estate, real, personal, and mixed, I give and devise unto John Rogers, son of the late Daniel S. Rogers, Esq., Margaret B. Blanchard, Edward A. Pearson, Henry B. Pearson, children of the late Eliphalet Pearson, Eliza S. Quincy, Maria S. Quincy, Margaret M. Quincy, (now Greene,) Anna C. L. Quincy, (now Waterston,) and Abigail P. Quincy, daughters of said Josiah Quincy, senior, and to their heirs and assigns forever. If said John Rogers shall die in my lifetime, his issue shall take his share of said residue; but, in case any of the other residuary legatees shall not survive me, his or her share shall go to the survivors."

None of these persons died in the lifetime of the testator. The will was dated May 31, 1849, and the codicil on the 6th of June, six days after the date of the will. The testator died about the 9th of December, in the same year, and the will was admitted to probate on the 14th of January, 1850.

The will, in addition to the clauses cited, contains a variety of other provisions; among them, a large provision is made for the sister of the testator, Mrs. Tracy. It is further directed, that the legacies shall be paid within six months after the death of the testator; or that, if not paid, interest shall be paid upon them after the expiration of that period. Mr. Quincy is nominated as executor of the will, and certain

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trustees are also named for specified purposes, of whom no bonds are to be required.

The codicil above referred to, then follows. It is in these words:—

“ Upon a reperusal of the preceding will, I find that my intention, in respect to the legacies thereby given to Mrs. Blanchard, and her two brothers, Messrs. Edward A. Pearson, and Henry B. Pearson, is not carried into effect.

“ I, therefore, in this particular, declare my will to be, that the sum of six thousand dollars shall be taken by Mrs. Blanchard and her brothers, or those of them who shall survive me, they to share alike; but if all these persons shall die in my lifetime, then the said sum shall sink into the residue of my estate.

“ I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will, and this writing shall be taken as a codicil thereto, hereby ratifying said will in all other particulars.”

The question then is, as to the effect of these words: “ I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will.”

The six other legatees contend that “that” means *all the provision* made in the will for these three legatees, including their shares in the residue. On the other side, it is contended that it applies only to the specific provision, relating to the three particular legacies of two thousand dollars, amounting in the whole to six thousand dollars, given to Mrs. Blanchard and her two brothers; that the codicil was only intended to correct the error in that clause, and that it left the residuary bequest untouched.

The leading rule in the interpretation of wills is, to ascertain, if possible, the intent of the testator. This is said, in the figurative language of some of the cases, to be the polestar which should guide the court in its decision. We must ascertain what is the intention, the purpose, or will of the testator. It may be said of all written instruments, and it is in some sense true, that they are to be construed with reference

to the intention of the parties to them. But in a testament there is only one party ; in other written instruments, generally two or more. In construing a contract, the will of all the parties to it is to be sought, and, when discovered, constitutes the contract. But in wills, the intent of the testator alone is to be looked for, and, when discovered, it governs ; because it is his intention, manifested in his words, which makes it his last will and testament.

There are various modes to be resorted to, in order to ascertain the meaning and intent of the testator, in any particular provision : 1, By a careful consideration of the particular provision as expressed, especially noting whether the will is carefully drawn by a person of skill, or whether by a person manifestly illiterate ; 2, by considering the general scope and tenor of the will, taken as a whole ; 3, by taking every clause and item, in whatever part of the instrument they may be found, which may have any bearing on each other, however remote they may be from each other. An intent declared in the preamble of a will, for instance, "desirous of disposing of all my estate," may have the effect to construe a doubtful devise in the clause to carry a fee, which would otherwise carry an estate for life only, and leave a remainder ; 4, by taking into consideration all the circumstances and relations in which the testator was placed ; 5, where there is a codicil, they are to be construed in reference to each other, to determine, from change of circumstances or otherwise, what it is intended to alter, and what to retain and confirm ; 6, the codicil shall change the will so far only as the intent is manifest, especially where, in all other respects, the will is in terms ratified and confirmed.

There are no very direct authorities. There is one recent case, which may have some bearing upon the present; *Hearle v. Hicks*, 8 Bing. 475, decided by the house of lords. The general position there maintained was, that where the terms of the will were clear to give an estate, the words of a codicil must manifest an intent equally clear to revoke it. Though, if the codicil stood alone, its language might seem to require one construction, yet, if the effect of such construction is to

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revoke a clear grant made by the will, the court will not give it that construction, unless the words of revocation by the codicil are equally clear with the language of the grant in the will.

We will now turn to a more careful examination of this codicil, to see what it was apparently the testator's intention to do, and what, in legal effect, he has done. It was made so soon after the will, that he had only time to make a deliberate examination. Having done this, he discovers that the will, as written, does not carry out his intention. In consequence of which, and in order to carry out his original intention, he proceeds to make an alteration *in this particular*. From the alteration in fact made, we learn what was his original intent a determination expressed to make an alteration in one particular, negatives, by implication, any intention to alter it in any other respect. He then says, I declare my will to be, that the sum of six thousand dollars shall be taken by Mrs. Blanchard and her said brothers, or those of them who shall survive me, they to share alike. But if all three persons shall die in my lifetime, then said sum shall sink into the residue of my estate. It seems to us that the meaning of this is quite obvious. He wishes to consider this family, of a sister and two brothers, as a class; his intention was, and is now declared to be, that, instead of three such legacies of \$2,000, they shall take the \$6,000 as a class; and if all, or two, or either one live to take it, they shall take and enjoy the whole; whereas, by the will as it stood, if either died in the lifetime of the testator, the legacy of that one would lapse into the residue of the testator's estate, without right of survivorship, between the brothers and sister.

He then proceeds, in the codicil, to declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will. It would be strange, if no intent to change the general distribution had intervened, to suppose that \$6,000 to them, with survivorship, was intended as a substitute for \$6,000 in their separate legacies, and also the ninth part of an uncertain residuum, which might be a large one. It was necessary that some substitu-

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tion should be declared ; otherwise, it might have been claimed to be \$6,000, in addition to the three legacies of \$2,000 in the will. *De Witt v. Yates*, 10 Johns. 156.

It turns upon the use of the word "provision." He certainly might have expressed his intention more clearly by saying, in lieu of the three legacies ; but, from the context and subject-matter, we think that was his intent.

Another consideration, which leads to the same conclusion. In using a questionable word, where the question is in what sense he used it, we are to consider what it was his declared intention to do. Here the declared intention was, to set the will right in one particular, when he had discovered, on a reperusal, that his intention had not been expressed. To ascertain what error he intended to correct, we may first inquire, what error or mistake he had discovered. This he does state ; " on a reperusal, &c., I find my intention in respect to the legacies thereby given to Mrs. Blanchard and her two brothers, Messrs. Edward A. Pearson and Henry B. Pearson, is not carried into effect." He perceives no mistake in finding their names as residuary legatees. The mistake is in regard to the legacies given. Now, in common parlance, as well as in a more precise use of language, a "legacy" is distinguishable from the gift of a residue, or share in a residue.

It was the manner in which the gift of the legacies was expressed in the will, with which alone he expressed himself dissatisfied ; and it was that, and that alone, which he intended to set right in the codicil.

The court are, therefore, of opinion, that the codicil did not revoke the residuary gift to Mrs. Blanchard and the two Pearsons, and that they are entitled to their shares therein.

Decree accordingly.

CHARLES C. LITTLE & others vs. THE CITY OF CAMBRIDGE.

L. & B., booksellers and publishers in B., owned a building in C., which was leased by them to B. & H., printers, and N. & R., bookbinders. B. & H. contracted to do all L. & B.'s printing, so far as they were able, and N. & R. their binding; but L. & B. had printing and binding done at other establishments. L. & B. had stereotype plates and paper stored at C., in fire-proof buildings on the same lot of land with the above-mentioned building, B. & H. having a right to enter and take out the plates whenever they had occasion to use them for printing. L. & B. paid a tax in the city of B. for personal property of the firm, and L. also paid a personal tax in C. where he resided. The City of C. imposed a tax on the stereotype plates and paper stowed there, and it was held to be illegal, L. & B. having no "place of business" at C. within the meaning of Rev. Stat. c. 7, § 13.

THIS was an action of assumpsit to recover the sum of two hundred and fifty-two dollars, with interest from the 24th day of June, 1849, being the amount of a tax assessed on the plaintiffs by the city of Cambridge, in May, 1849, and paid under protest by the plaintiffs, who denied the legality of the tax. The case was submitted to the court of common pleas, on the following agreed statement of facts; on which *Bigelow*, J., gave judgment for the defendants. The plaintiffs appealed to this court.

The plaintiffs are a firm doing business as booksellers and publishers, in the city of Boston, under the name of Little & Brown. The members of the firm are Charles C. Little, who resides in the city of Cambridge, James Brown, who resides in Watertown, and Augustus Flagg, who resides in Boston.

Charles C. Little and James Brown are the owners, as tenants in common, of certain land in Cambridge, on which they have erected a large building, which is occupied as a printing-office and bookbindery. Part of this building was, in May, 1849, under lease for a term of five years, to Bolles & Houghton, printers, and a part to Nourse & Remick, bookbinders. The leases were dated January 1, 1849. On the same parcel of land there are two one-story fire-proof buildings, also built by Charles C. Little and James Brown, as tenants in common, one for the storage and safe keeping of stereotype plates,

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and the other for the storage and safe keeping of printing paper and printed sheets for books belonging to the firm of Little & Brown. The room and the key of the fire-proof building for the storage of the stereotype plates, by the terms of the lease to Bolles & Houghton, were to be in the possession of Little & Brown. The other fire-proof building was never leased.

By a contract between the plaintiffs and Bolles & Houghton, dated January 1, 1849, the former agreed to give all their printing to Bolles & Houghton, and Bolles & Houghton bound themselves to do all the plaintiffs' printing, and were to have the use of the plaintiffs' stereotype plates for that purpose. But if Bolles & Houghton were unable to perform all the plaintiffs' printing as fast as it was wanted, the plaintiffs were at liberty to employ other printers. And whenever Bolles & Houghton have been unable to do all the plaintiffs' printing, the stereotype plates have been taken by the plaintiffs to other printers in Boston, and been stored there while being there used, in their fire-proof safe in Boston, and, after having been used there, have been returned to the fire-proof building in Cambridge, where they are kept except when taken away to be used as before stated. The key of this fire-proof building was kept in the printing-office of Bolles & Houghton, and they had a right to enter the building and take out the plates, whenever they had occasion to use them for printing, and to return the plates when they had done using them.

By a similar contract between the plaintiffs and Nourse & Remick, the latter were to have and do all the binding of the plaintiffs' law books, so far as they were able to perform it, and the books, when bound, were taken to the plaintiffs' store in Boston, where they were sold, and at no other place.

The plaintiffs have no other business connection with the occupants of the above-described premises, than is above specified.

During the last two years, it has several times happened that all the plaintiffs' printing and bookbinding could not be performed by Bolles & Houghton and by Nourse & Remick respectively, and the plaintiffs have employed other printers

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and bookbinders, and have taken the stereotype plates and printed sheets from the fire-proof buildings above mentioned, to be worked for them by other printers and bookbinders.

The tax in question was assessed on the stereotype plates and printed sheets in the fire-proof buildings, on the first of May, 1849. The firm of Little & Brown was taxed in Boston, in 1849, for personal property belonging to their firm, and Mr. Little also paid a personal tax in Cambridge.

Such judgment to be entered as the court may direct.

P. W. Chandler and J. P. Putnam, for the plaintiffs.

E. Buttrick, for the defendants.

FLETCHER, J. The plaintiffs seek to recover, in this action, the amount of a tax assessed on them by the city of Cambridge, and paid by them under protest, denying the legality of the tax. The case is submitted to the court on an agreed statement of facts.

The plaintiffs are copartners, doing business as booksellers and publishers, in the city of Boston, under the name and firm of Little & Brown. The tax in question in this suit was assessed by the city of Cambridge on the plaintiffs, in May, 1849. The said firm was taxed in Boston, in 1849, for personal property belonging to the firm, and Mr. Little also paid a personal tax in the city of Cambridge, where he resided.

There can be no doubt, that the plaintiffs were lawfully jointly taxed as partners in Boston, where they had their place of business. But the defendants maintain, that the plaintiffs had another place of business in Cambridge, and were, on that ground, lawfully taxed there, under and by virtue of the 13th section of the 7th chapter of the revised statutes. That section is as follows, to wit: —

“ Sect. 13. Partners in mercantile or other business, whether residing in the same or different towns, may be jointly taxed, under their partnership name, in the town where their business is carried on, for all the personal property employed in such business; and if they have places of business in two or more towns, they may be taxed in those several towns, for the proportions of property employed in such towns respectively; and,

in case of being so jointly taxed, each partner shall be liable for the whole tax."

The simple question is, whether, upon the facts stated, the plaintiffs had a place of business in Cambridge, so as to be liable to be taxed there under this section of the statute.

By the terms "place of business," used in the statute, as applicable to this case, must be understood a place where business was carried on by the plaintiffs, under their own control and on their own account. If the plaintiffs had any such place of business, it must have been either the printing-office or bookbindery. No other place is suggested. But the statement of facts conclusively shows, that the business in these two places in Cambridge was carried on by two distinct, independent firms, other than the plaintiffs.

Messrs. Bolles & Houghton had a lease of the printing-office, for a term of years, for which they paid an annual rent. This was exclusively their place of business, which they conducted in their own way, and on their own account and risk. Messrs. Nourse & Remick had a lease of the bookbindery, for a term of years, for which they paid to the plaintiffs an annual rent. This was very clearly their place of business, in which they carried on a distinct, independent business of their own, and wholly on their own account. Both these firms did work for the plaintiffs, and that was all the connection which the plaintiffs had with them. They were not hired as laborers, to work under the plaintiffs, at their place of business, but the plaintiffs contracted with them as distinct, independent firms, doing business on their own account, and at their own places of business.

Bolles & Houghton were to do all the plaintiffs' printing, so far as they were able, for which they were to be paid, for a part of it at agreed prices, and for the rest at fair market prices. Nourse & Remick were to do all their binding, for which they were to be paid, for a part fair market prices, and for other parts the same prices which the plaintiffs had before paid them. If the business of the plaintiffs had not been sufficient to furnish employment to these two establishments, they would, of course, have done work for other customers, as they

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might have had applications. The contract with Bolles & Houghton seems to suppose that they may do work for persons other than the plaintiffs, as it is provided that they shall give the plaintiffs' work a preference, unless under particular circumstances, as stated. With the laborers employed in these establishments the plaintiffs had no concern, and over the places where the work was done they had no control. In point of fact, all the plaintiffs' printing was not done by Bolles & Houghton, nor all their binding by Nourse and Remick, but portions of each were done at other establishments, which, so far as appears, might as well be considered the plaintiffs' places of business as these at Cambridge. The amount of the work done at any particular place, would not affect the principle.

The fact that the stereotype plates and the paper, for which the plaintiffs were taxed, were stowed at Cambridge, in the manner and under the circumstances stated, would not authorize the tax. The right of the city of Cambridge to impose the tax depended upon the plaintiffs having a place of business within that city, and the facts very clearly do not show that the plaintiffs had a place of business in Cambridge, within the meaning of the statute.

Judgment for the plaintiffs for the amount paid, and interest from payment.

HENRY RICE vs. MATTHEW COBB.

The owner of a vessel mortgaged one half of her to R., and subsequently mortgaged the whole of her to G. & S., expressly subject to R.'s lien. G. & S. effected an insurance on their interest, and, the vessel becoming a total loss, abandoned her to the underwriters; and it was held that R. was entitled to one half the salvage.

THIS was an action of assumpsit to recover one half of the proceeds of the sale of the wreck of the brig "Maria L. Hill."

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the plaintiff claiming to be part owner. It was submitted to this court upon the following agreed statement of facts:—

On the twenty-third day of November, 1843, Ira W. Brown, of Perry, in the State of Maine, was owner of a brig named the Maria L. Hill, then lying in the port of Perry. On the same day, Brown, by a bill of sale, conveyed one undivided half of the said brig to Henry Rice, of Boston, in consideration of two thousand dollars, in which bill of sale was contained the usual clause of defeasance.

The bill of sale was duly recorded on the same day in the records of the town of Perry.

On the same 23d day of November, Brown, in consideration of the sum of five thousand dollars, conveyed the brig to Messrs. Gregerson & Sumner, of Boston, subject to the lien created by the mortgage to Henry Rice before mentioned, by a bill of sale containing this clause of defeasance:—

“That if the said Ira W. Brown pay, in six, nine and twelve months, in three equal payments, unto the said Gregerson & Sumner, the sum of thirty-three hundred dollars, and also such sums as they shall hereafter pay for insurance, and all their commissions on business done or to be done for said brig, then this instrument to be void.”

On the 24th day of November, 1843, Brown conveyed one fourth part of the brig to Alfred Hill, by a bill of sale, the consideration in which was fifteen hundred dollars, no mention being made in the bill of sale of the previous conveyances to Rice and to Gregerson & Sumner.

On the 2d day of December, 1844, Gregerson & Sumner caused the brig to be insured by the Equitable Safety Insurance Company, in Boston, for the sum of seventeen hundred dollars, on account of whom it might concern, the loss payable to Gregerson & Sumner. The risk was for a month from the 1st day of December, 1844. In the policy, the brig was valued at nine thousand dollars. On the 3d day of December, 1844, Gregerson & Sumner caused the brig to be insured by the Warren Insurance Company, at Boston, for the sum of five thousand dollars, for whom it might concern, the loss payable to them. The risk was for one month from the first

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day of December, 1844. In the policy, the brig was valued at nine thousand dollars. The above insurance was effected by Gregerson & Sumner, to cover the interest of Alfred Hill in the brig, as well as their own, they having been duly authorized thereto by Hill. Rice did not take possession under his mortgage.

In the month of December, 1844, within the time covered by the policies, on her passage from New York to Boston, the brig met with a total loss, and was abandoned to the underwriters, who paid to Gregerson & Sumner the whole amount of the two policies before mentioned. Gregerson & Sumner have duly accounted to Mr. Hill for his interest in the payment made under the policies.

The hull, sails, rigging, and materials of the brig, thus abandoned to the underwriters, were sold by the defendant as the agent of the underwriters, on the 12th of March, 1845, and produced the net sum of one thousand and fifty-six dollars and nineteen cents. The sums paid to the Equitable and Warren Insurance Companies severally, out of the proceeds of the sale, were, according to the proportion which the amount insured at each office bore to the estimated value of the brig; that is to say, fifty-ninetieth parts, being five hundred and eighty-six dollars and seventy-eight cents, were paid to the Warren Insurance Company, and seventeen-ninetieth parts, being one hundred and ninety-nine dollars and fifty cents, were paid to the Equitable Insurance Company; and the remainder, two hundred and sixty-nine dollars and ninety-one cents, were reserved for the plaintiff by the defendant, and he has always been ready and willing to pay the same. The insurance companies have refused to pay the amounts claimed of them.

The plaintiff contends that, under his mortgage, he is entitled to the sum of five hundred and twenty-eight dollars and nine cents, being one half the net amount received by the defendant, with interest from March 12th, 1845, the time the same was received by the defendant, and this action is brought to recover that sum.

An action has been also commenced in this court by the

plaintiff, against Ira W. Brown upon his notes above mentioned, in which Gregerson & Sumner have been summoned as trustees. That action is still pending, and Gregerson & Sumner, in their answers, deny that the plaintiff has any right to any of the money received by them from the insurance offices. [See the next case.]

Judgment is to be entered for the plaintiff, for such sum as, in the opinion of the court, he may be entitled to recover from the defendant and the Equitable and Warren Insurance Companies.

C. W. Loring, for the plaintiff.

G. S. Hillard, for the defendant.

BIGELOW, J. Upon the facts stated in this case, we have no doubt of the right of the plaintiff to recover one half of the net proceeds of the brig, which have been received by the defendant. To make this entirely clear, it is only necessary to consider the nature of the title of the respective parties to the vessel, at the time of her loss. The plaintiff claims under a mortgage of one half of the brig, made to him by the original owner, prior to any encumbrances, and subject to no previous liens. The validity of this mortgage is not drawn in question. Upon the most familiar principles, the plaintiff acquired by it a legal title to one half of the brig, liable only to be defeated by payment of the debt, secured by the mortgage, according to the conditions therein expressed.

The title of the defendant, or of those whom, for the purposes of this case, he represents, is derived from an abandonment of the brig, made by Gregerson & Sumner, for a total loss, under two policies of insurance, effected by them upon their interest and that of one Alfred L. Hill in the vessel. Under this abandonment, the defendant can claim no other or greater right or interest than that which belonged to the assured, at the time it was made. The effect of an abandonment is to vest in the insurers the title to the property, or what remains of it, so far as it belonged to the insured at the time of the loss, and to the extent of the interest covered by the policy. 2 Phil. Ins. (2d ed.) 423; 2 Arn. Ins. 1178. Gregerson & Sumner having effected insurance for themselves and said Hill, it becomes, therefore, necessary to ascertain what

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interest they, respectively, had in the brig, which was covered by the policies. The title of the former was under a mortgage of the whole brig, subject, however, to the prior mortgage of the plaintiff upon one half, which is expressly mentioned in this mortgage, as constituting a prior encumbrance upon the vessel. The title of Hill was as owner of one quarter, subject to the two previous mortgages above named. For the decision of this case, it is wholly immaterial whether the title under either of the mortgages had become absolute by foreclosure, because no question arises, in this case, as to the rights of the original owner and mortgagor of the vessel. It is simply a question as to priority of title between two mortgagees of personal property. Upon the facts above stated, it is clear that the right of the plaintiff, so far as one half of the brig is concerned, was paramount to that of Gregerson & Sumner at the time of abandonment. It was expressly made so by the very terms of their mortgage. The debt due to the plaintiff, and secured by the mortgage, being then unpaid, he was the legal owner of one half of the property, which remained of the vessel after the loss. So far as the rights of the parties to this case are concerned, therefore, at the time of the abandonment, each was the owner of one half of the wreck of the brig; Rice, the plaintiff, by virtue of his prior mortgage on one half; the defendant, by virtue of the abandonment of Gregerson & Sumner. The whole amount of the salvage being insufficient to pay the debt due the plaintiff, he has a right to his entire one half of the amount, and, therefore, as the facts now are, the mortgage to Gregerson & Sumner of that one half, subject to the prior claim of the plaintiff, conveys no valuable interest to them. The case stands, therefore, precisely as if Rice, and Gregerson & Sumner, were originally respectively owners of one half of the brig. Rice was, at the time of the loss, his own insurer. Gregerson & Sumner having obtained insurance, and the vessel being lost, by their abandonment substituted the parties whom the defendant represents in their place, to the extent of their interest. This being so, the case must be decided in the same manner as if two persons, jointly owning a vessel, had each procured

a policy on his one half. Upon a total loss and abandonment, the insurers would each be entitled to one half of the salvage.

The fallacy of the argument, urged in behalf of the defendant, consisted in regarding the plaintiff's mortgage merely as a lien, having no priority or preference over that of Gregerson & Sumner. It was, to the extent of his debt secured by it, an absolute title, and to be so treated under all circumstances, till the debt was extinguished. His rights, therefore, to the salvage, are not to be measured and proportioned according to his insurable interest merely. Nor can they be in any way affected by the acts of Gregerson & Sumner, subsequent mortgagees, or by those claiming under them. So long as the brig, or any part of it, is in existence, the plaintiff has a right to have one half for his own benefit and use, until he realizes the full amount of his debt. He can, therefore, well maintain this action to recover one half of the proceeds of the sale of the vessel, which have come into the hands of the defendant, as money received by him for the sale of the plaintiff's property.

It was strongly urged, in behalf of the defendant, that the ordinary rules of law, applicable to mortgages of personal property, ought not to be applied to ships or vessels; that, having regard to the peculiar nature of the property, its employment on the high seas, and to its being often in distant and foreign ports, titles cannot be investigated, and can only appear upon the face of ship's papers, and where, from the necessity of the case, it might often be needful to obtain money upon the security of the vessel, there would be great hazard and manifest inconvenience, if a mortgage of such property, in one state, was allowed to create a lien or title paramount to all other claims upon a vessel, whenever or however incurred. Certainly, there would be very great force in this argument, if it were well founded, or applicable to the case at bar; any such rule would, doubtless, be productive of serious impediments to commerce, and might lead to enormous frauds. But the case at bar can furnish no plausible ground for any such argument. This is not the case of a pledge of a vessel in a foreign or distant port, for any pur-

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pose connected with her navigation, repairs or supplies, such as often arise in the prosecution of a voyage, but a mere question of property, between persons claiming adversely, by titles created in the home port, in the common and ordinary transaction of business, under local laws, well known and familiar to all persons conversant in such matters, and where the decision of the case turns solely on the question as to whom belongs the better title. Besides, the statutes of the State of Maine (Rev. Sts. c. 125, § 34,) under which the mortgages in the present case were made, as well as the statutes of our own commonwealth, (Rev. Sts. c. 74, § 6,) expressly provide, that mortgages of ships or vessels, made in pursuance of said statutes, "shall in no case avoid or defeat any contract of bottomry or *respondentia*, nor any transfer, assignment, or hypothecation of any ship, at sea or abroad, if the mortgagee shall take possession of such ship, as soon as may be after the arrival thereof within the state." These statutes recognize the existence of a commercial code of universal application, the usages and laws of which are paramount to any right created by local laws.

Judgment for the plaintiff.

HENRY RICE vs. IRA W. BROWN & Trustees.

A mortgagee of a vessel, who takes possession for breach of condition, under the laws of Maine, the right of redemption having expired, and receives from the master the freight money of a voyage just completed, agreeing to pay all outstanding bills against the vessel, and who afterwards procures insurance on her, "for whom it may concern, payable to himself in case of loss," is not chargeable by the trustee process, in an action against the mortgagor, for any portion of the insurance money received by him, the vessel having become a total loss; but is chargeable for any balance of freight money remaining in his hands after the payment of bills, as agreed, such freight money having been earned while the vessel was allowed to remain in the possession of the mortgagor.

THIS was an action to recover the sum of fifteen hundred dollars and three cents, being the amount of three promissory

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notes, dated the 28th of November, 1843, payable in six, nine, and twelve months, with interest from the date. The writ was dated the 26th of December, 1844. The defendant was defaulted; and the only question was as to the liability of W. H. Gregerson and F. A. Sumner, summoned as his trustees. The question was submitted to this court upon an agreed statement of facts, which, so far as material, are stated in the opinion of the court. The case was argued at a former term.

C. G. Loring, for the plaintiff.

C. Sumner, for the trustees.

BIGELOW, J. The only question submitted to the consideration of the court in this case is, whether Gregerson & Sumner, who were summoned as trustees of the principal defendant, are legally chargeable as such.

The main facts, upon which the decision of this question turns, are these. On the 23d day of November, A. D. 1843, the principal defendant, Brown, was the owner of the brig *Maria L. Hill*, then lying in the port of Perry, in the state of Maine, where she had, a short time previously, been built, and where said Brown, the owner, resided. On that day and at that place, he conveyed said brig to said Gregerson & Sumner, the supposed trustees, by a deed in the common form of a mortgage of personal property, subject, however, to a previous mortgage, made on the same day, to the plaintiff, of one half of said vessel. The condition of the mortgage was: "That if said Brown should pay, or cause to be paid, in six, nine, and twelve months, in three equal payments from the date of the mortgage, to said Gregerson & Sumner, the full amount of their bill for sails, rigging, and supplies to the vessel, amounting to thirty three hundred dollars or thereabouts; and also such sums as Gregerson & Sumner should thereafter pay for insurance, and all their commissions on business done for the vessel, then the mortgage was to be void, otherwise to remain in full force." By this conveyance, Gregerson & Sumner became mortgagees of the entire vessel, subject only to the previous mortgage of one half to the plaintiff. It is admitted by the parties that the mortgage to Gregerson & Sumner is in due form, and properly recorded

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in the book of records of the town of Perry on the day of its date, according to the statute provisions of the state of Maine. No part of the debt due to Gregerson & Sumner was paid; and on the 23d day of November, 1844, all of the instalments having then been long due and unpaid, they took possession of said brig in New York, where she then was, under their mortgage, for breach of condition, received from the master the freight money of the previous voyage just then completed, amounting to nine hundred dollars, agreeing to pay the bills then outstanding against the vessel, which they accordingly did; procured a part of a cargo of hemp, some of which was shipped on their own account, and ordered her round to Boston, for which place she sailed about December 1, 1844. While prosecuting her voyage thither, the brig was totally lost. After taking possession under their mortgage, and about the time the vessel left New York for Boston, Gregerson & Sumner procured two policies of insurance on the brig, for whom it might concern, payable to themselves in case of loss; one from the Warren Insurance company for five thousand dollars, and the other from the Equitable Safety Insurance company for seventeen hundred dollars, the vessel being valued in both policies at nine thousand dollars. After the loss of the brig, and before the service of the writ in this case upon them, the insurance money was paid to Gregerson & Sumner. In their answers, the trustees state that the insurance was effected solely for their own interest in the vessel, and for that of Alfred Hill, master of the brig, to whom Brown had previously conveyed one quarter part of the brig, subject to the previous mortgages thereon to the plaintiff and to said Gregerson & Sumner. They deny that said insurance was effected in any way for or on account of said Brown, the principal defendant, or that he has any right or claim to any part of the money received by them under said policies. Upon these facts, the liability of Gregerson & Sumner to be charged as trustees depends; and the decision of this question must turn upon the right of Brown, the principal defendant and original owner and

mortgagor, to claim of them the balance remaining in their hands, after paying their debt and charges in full.

The mortgage, under which the supposed trustees took possession of the brig, was made in the state of Maine, by a person domiciled there, upon property there situated, and the conveyance was there completed and took effect. The obligation of the contract, the rights it conferred, and its legal effect, must, therefore, be determined by the laws of that state. Story's Conf. Laws, § 241 *et seq.* By Rev. Sts. of Maine, c. 125, § 30, which was in force at the time this mortgage was made, it is enacted, that "when the condition of any mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same, at any time within sixty days after said breach." Previous to the enactment of this statute, it had been decided by the supreme court of Maine, in *Flanders v. Barstow*, 6 Shepley, 357, that by a conveyance of goods in mortgage, the whole legal title passed conditionally to the mortgagee, and, if not redeemed by the time stipulated, the title became absolute at law; and that, if goods be sold by a mortgagee, after condition broken by the neglect to pay one of several notes secured by a mortgage, for a sum exceeding the entire amount of the debt, to secure which the mortgage was given, the balance over and above the debt due the mortgagee cannot be recovered of him by the mortgagor, in an action for money had and received. The statute above cited was enacted subsequently to the case of *Flanders v. Barstow*, and was intended to enlarge the time of redemption, by giving the mortgagor sixty days after breach for that purpose. The decision of the supreme court of Maine was only declaratory of the common law, of which the rule has always been, that a mortgage of personal property is a conveyance of the legal title presently, defeasible upon a condition; and it becomes an absolute interest at law immediately, if not redeemed at the appointed time. 4 Kent's Com. 138. Such was the law of this commonwealth, as we suppose, until the St. of 1843, c. 72, § 1, which enlarged the time of redemption until sixty days after notice of an inten-

tion to foreclose. Under the statute of the state of Maine above referred to, by which the rights of mortgagor and mortgagees in the present case are to be governed, there can be no doubt that the title of the mortgagees of personal property becomes absolute at law sixty days after breach of condition. On the 23d day of November, when Gregerson & Sumner took possession of the brig in New York, a breach of the condition of the mortgage had existed over six months; and, therefore, they then became absolute owners of the vessel, so far as Brown, the original mortgagor, was concerned, without any right on his part to redeem, or any claim or interest at law in the vessel or her proceeds. This being so, it follows as a direct and necessary consequence, that the insurance effected by them, subsequent to their taking possession, was on their own sole account and interest, except so far as they voluntarily permitted Hill, the master, to participate in it; and that Brown having previously lost all title to the brig, by his failure to fulfil the condition of the mortgage and its consequent foreclosure, had no insurable interest in the vessel, and no right to claim of the mortgagees any portion of the money received by them under the *policies*. The supposed trustees cannot, therefore, be charged for any part of the insurance money.

It was urged, in behalf of the plaintiff, that upon the facts disclosed it did not appear that they took possession of the brig for the purpose of vesting the title in themselves, and that it was fairly to be inferred that they acted in part as agents for Brown in effecting the insurance, and intended that he should receive the balance remaining in their hands after their debt was paid. The court are not at liberty to draw any such inferences from the answers of the trustees. They are, for the purposes of this case, to be taken as true. Rev. Sts. c. 109, § 15. They expressly state, that they did take possession of the vessel under their mortgage; that the insurance was not effected for or on account of Brown, the original owner and mortgagor, either in whole or in part; that he had no interest therein; and that they had carried the balance of money received under the policies to profit and

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loss account upon their own books. So far as they allowed the master of the vessel to participate in the insurance money, it was entirely voluntary on their part, and the result of a special agreement made by them with him.

The question still remains, whether Gregerson & Sumner are liable to be charged as trustees of Brown, for any part of the sum of nine hundred dollars received by them of the master at New York, at the time they took possession of the vessel, for freight earned by her in the voyage just then completed. This money was received as earnings, while the brig was allowed to be in the possession of Brown, the principal defendant, as owner of three fourths, and of Hill, the master, as owner of one fourth, sailing her with the assent and knowledge of Gregerson & Sumner, on their own account, and liable for all charges and expenses, and with a right to her earnings. This money, therefore, did not belong to Gregerson & Sumner as mortgagees. Their lien extended only to the vessel, and not to her earnings before they took possession under their mortgage. They received it from the master, upon an agreement, on their part, to pay out of it the bills then outstanding for current expenses against the vessel. Three fourths of this sum, therefore, belonged to Brown, the principal defendant, and is to be accounted for to him by Gregerson & Sumner, after paying the said charges against the brig. Upon the facts in this case, it is quite apparent that they have realized a sum of money under the policies of insurance more than sufficient to pay the debt and charges due from Brown to them, so that they can have no set off against this sum other than the bills which, by agreement with the master, were to be paid out of it. If, therefore, any part of the nine hundred dollars is remaining in their hands after paying such bills, they are liable to be charged, as trustees of Brown, for three fourths of such balance. In conformity with the agreement of the parties, the case must be sent to an assessor, to ascertain how much of that sum is now remaining in their hands.

Dudley, Assignee v. Coburn.

ELBRIDGE G. DUDLEY, Assignee *vs.* DANIEL J. COBURN.

A. sold out his stock in trade to B., for a small sum in cash, and the balance in notes, secured by a mortgage of the goods. Four days afterwards, a part of the same goods was attached by the defendant, a deputy sheriff, on a writ against A., as his property. B., by his attorney, the plaintiff in this action, immediately commenced an action of trespass against the defendant for the goods. The action was defended on the ground that the sale to B. was in fraud of creditors and void, and a verdict was found for the defendant. Meantime A. filed his petition in insolvency, and in his schedule of assets were included the notes and mortgage above mentioned, but not the goods purchased by B. The plaintiff was chosen assignee of A., and, as such, and at the request of the creditors, bought back all the goods of B. which he had purchased of A., paying him therefor a certain sum in cash, and giving him up the notes and mortgage, and took a bill of sale of all the goods in the store, including those in the hands of the defendant. The plaintiff, as assignee, then demanded the goods of the defendant, and, on the defendant's refusal to deliver them, brought trover for their value; and it was held that he was not estopped by his having prosecuted the suit of B. against the defendant, from setting up the property in the goods to be in himself, as assignee of A.

THIS was an action of trover, by the plaintiff, as assignee of David Austin, to recover the value of a quantity of carpeting and furniture. It was submitted to the court of common pleas on an agreed statement of facts, whence it came to this court by appeal.

David Austin was a furniture and carpet dealer, in Boston, and, on the ninth day of November, 1848, he sold out his stock of goods to one Royal Chase, who came to Boston, from Swansey, about that time. Chase paid a small amount in cash down, and gave his notes, to the amount of about \$2,000, for the balance, on three, six, and nine months, secured by a mortgage back on the goods. On the thirteenth day of the same November, the defendant, a deputy sheriff, by virtue of a writ, bearing date the eleventh day of November, of one George Jackson against David Austin, attached the goods sued for in the present action, being part of those sold by Austin to Chase, and carried them away, together with \$62.20 in money, received for goods sold out of the store, while the defendant was in possession of the same.

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On the eighteenth day of the same November, Chase, by the plaintiff, as his attorney, commenced an action of trespass against the defendant, for the same goods and money.

On the fifteenth day of December following, Austin filed his petition with the commissioner of insolvency for the county of Suffolk, and was duly declared an insolvent debtor, and Coburn, the defendant, was appointed messenger. On the eighth day of January following, at the first meeting of the creditors, the plaintiff was duly elected assignee, and, on the fifteenth day of the same January, the plaintiff, as assignee, and at the request of the creditors, bought back all the goods of Chase, which he had purchased of Austin, and paid therefor \$410 in cash, the same being money received by him as assignee, and gave up his notes and mortgage, and took a bill of sale of all the goods in the store, and also of those in the hands of the defendant, for which the present action was brought, and took, likewise, a power of attorney to prosecute his action against Coburn, which had been entered and was then pending in the court of common pleas.

The mortgage and notes given by Chase to Austin were upon the schedule of the effects of Austin delivered to Dudley, as assignee, but the goods and chattels purchased by Chase of Austin were not contained therein. Dudley demanded the goods of Coburn, and offered to enter the action of Chase against him, in court, "neither party," if he would deliver him up the goods and money which he so held as the property of Austin; but he refused so to do.

At the following October term of the court of common pleas, 1849, the action of Chase against Coburn was tried, and at the trial, the defence, and the only defence, set up was, that the sale of the goods from Austin to Chase, on the ninth day of November, was fraudulent and invalid, being made for the sole purpose of hindering and delaying creditors in collecting their claims against Austin; and that the title to the goods never passed to Chase, but remained in Austin, and they were, therefore, liable to be attached by his creditors. The plaintiff insisted that the sale was *bonâ fide*. The jury could not agree, and the case was taken from them.

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At the following January term, 1850, the case was again tried, and the same defence set up. and the jury returned a verdict for the defendant.

Subsequent to the first trial, and prior to the second and last, the plaintiff offered to enter a nonsuit and pay the defendant's costs, provided he would give up the goods and money, but he refused so to do. Dudley argued the case for Chase to the jury, at the last trial. The defendant recovered judgment against Chase, for \$136.35 costs, which Dudley paid, and again, as assignee, demanded of the defendant the goods and money; but he refused to deliver them up, whereupon he commenced the present action.

Austin obtained his discharge at the third meeting of his creditors, in September, 1849. The writ of Jackson against Austin, on which the goods in controversy were attached, was entered at the January term of the court of common pleas, 1849, and the action continued from term to term till the following October term, when it was entered "neither party." The assignee had no knowledge of any fraud or design to cover the property from attachment, in the sale of Austin to Chase, and took no steps to set aside the sale, until after the decision of the action of Chase against Coburn.

On the thirty-first day of October, 1849, Coburn delivered to Jackson the goods and chattels claimed in the present action, and sixty-two dollars and twenty cents, the money attached upon the suit of Jackson as aforesaid, and took from Jackson a bond to indemnify him, Coburn, against all damages and claims, by all persons whatsoever, by reason of his so attaching and delivering the property to Jackson.

If, upon the foregoing statement of facts, the court shall be of opinion that the plaintiff is entitled to recover, then the defendant is to be defaulted, and the damages assessed by a jury, or an assessor appointed by the court; but if the court shall be of the contrary opinion, then the plaintiff to become nonsuit, each party reserving the right to appeal.

Judgment was ordered by *Bigelow*, J., for the plaintiff, and the defendant appealed to this court.

H. H. Fuller, for the defendant.

B. F. Hallett and E. G. Dudley, for the plaintiff.

Dewey, J. The particular history of the various proceedings in the suit of Chase against Coburn is of little practical importance, inasmuch as, after all those proceedings had terminated by a verdict of the jury and judgment of the court thereon, affirming the property in the articles now the subject of controversy to be in Austin, and not in Chase, the plaintiff, acting in his capacity of assignee of Austin, demanded of the defendant these goods, which demand the defendant refused to comply with.

The controversy between Chase and the creditors of Austin had terminated in favor of the latter, and the lien of the attaching creditors having been dissolved by the institution of proceedings in insolvency, no further right existed on the part of the defendant to retain the property. He had no interest in the same, but the property had wholly vested in the assignee of Austin, for the benefit of his creditors.

The fact that the plaintiff had, at an antecedent period, under an alleged purchase from Chase and a power of attorney from him, prosecuted the suit of Chase against the defendant, under the erroneous belief that Chase had a good title to the goods by purchase from Austin, does not estop the plaintiff from setting up, in this suit, the property in the same to be in himself, as assignee of Austin. The defendant has as uniformly heretofore asserted the property to be in Austin, as the plaintiff in Chase, and that issue between the parties was settled by a verdict and judgment thereon.

The estoppel is as strong against the defendant as the plaintiff, and thus neutralizes the objection, if it had any weight. Whatever errors may have attached to the course of proceeding on the part of the assignee, while prosecuting the suit of Chase against the defendant, the plaintiff is at last found pursuing his proper remedy, and we see no legal obstacle to his recovery.

Judgment for the plaintiff.

Danforth v. Pratt.

MARTIN G. DANFORTH vs. JABEZ PRATT.

In an action for taking insufficient bail, the measure of damages is the injury actually sustained by the judgment creditor; and evidence is competent, of the pecuniary condition of the debtor three months before he was liable to be taken in execution.

THIS was an action on the case, to recover damages of the defendant, as a deputy of the sheriff of Suffolk, for taking insufficient bail on mesne process, in a suit of Danforth against one Charles Pierce and others.

At the trial, before *Bigelow, J.*, in the court of common pleas, the plaintiff introduced evidence that the original writ, in his action against Pierce, was dated December 26, 1848, and returnable to the April term of the court of common pleas in the next year; that Pierce was arrested and gave bail, January 10, 1849; that Pierce, prior to the rendition of judgment in the action, to wit, in June, 1849, left the commonwealth for California, and had not returned; that judgment was recovered against him at the July term of the court, 1849; that the date of the judgment was August 17, 1849, and the date of the execution was August 24, 1849; that the amount of the execution was \$290.59 debt and \$27.39 costs, and it was returnable to the October term of the court in that year. The plaintiff also put in evidence a judgment recovered by him on a *scire facias* against the bail in the above action, dated March 13, 1850, and the return of the defendant thereon, that, for want of goods or estate, he had committed them to jail. He also proved that the two persons taken as bail took the poor debtor's oath on the execution against them, one on the 2d of April, 1850, and the other on the 25th of May, 1850. He also introduced other evidence that one of the sureties in the bail bond was insufficient at the time he was taken as bail.

The defendant introduced evidence that he had been guilty of no violation of duty, but, on the contrary, that the sureties were sufficient at the time they were taken; and also proposed to show that Pierce, at the time of his arrest, and at

the time of his leaving the commonwealth, was poor and entirely destitute of property, and the plaintiff knew it when he arrested him. To the admission of evidence of this kind, the plaintiff objected, but the judge overruled the objection, and the plaintiff excepted.

The plaintiff, then, reserving all his right under his exceptions, admitted the facts thus proposed by the defendant to be proved, and also that Pierce, when he left, was poor and destitute of property, and was owing a large amount of debts.

The jury found for the plaintiff, and assessed damages at one cent.

H. G. Hutchins, for the plaintiff.

1. The officer taking insufficient bail is liable to the creditor for all damages suffered thereby. *Marsh v. Bancroft*, 1 Met. 497.

2. And the poverty of an absconding debtor does not tend to mitigate the damages; at all events, unless he is proved to have been worthless at and after the date of the rendition of the judgment against him.

3. The damage suffered by the plaintiff in this action was, the loss of the whole judgment which he had recovered against Pierce, and the cost of fruitless suits against the bail, deducting the value of his judgment against Pierce and against the bail. Rev. Sta. c. 91, § 5; *Young v. Hosmer*, 11 Mass. 89; *Nye v. Smith*, 11 Mass. 188; *Gerrish v. Edson*, 1 N. H. 82; *Crooker v. Hutchinson*, 1 Vt. 73.

J. A. Andrew, for the defendant.

BIGELOW, J. The single question presented by the bill of exceptions in this case is, whether, in an action on the case against the sheriff, for taking insufficient bail, it is competent for the defendant to prove, in mitigation of damages, the inability of the original debtor to pay the judgment which has been obtained against him, in the suit upon which he was arrested. The decisions on this point have been uniform in this State, and it is now quite too late to reopen the question. *Weld v. Bartlett*, 10 Mass. 470; *Young v. Hosmer*, 11 Ib. 89; *Nye v. Smith*, 11 Ib. 188; *Shackford v. Goodwin*,

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13 Ib. 186; *Brooks v. Hoyt*, 6 Pick. 468; *West v. Rice*, 9 Met. 564.

In all these cases, it has been held, that the true measure of damages is the injury actually sustained by the judgment creditor; and, therefore, evidence tending to show that the debtor was poor or insolvent, so that, if arrested on execution, it would not have enabled the creditor to realize his debt, also tends to prove that the plaintiff suffered no essential injury by the negligence of the officer.

It was urged by the counsel for the plaintiff, that the evidence offered by the defendant, at the trial, was inadmissible; because it was not confined to the pecuniary condition of the debtor at the time of, and subsequent to, the rendition of the judgment against him. But this argument loses sight of the distinction between the competency and the weight of evidence. The precise fact to be proved was, undoubtedly, the inability of the debtor to pay the debt, at the time when he was liable to be taken on execution; but evidence which showed that, previous thereto, he was deeply insolvent, tended also to prove that he was so at the period of time in question. Such testimony may be quite unsatisfactory, and subject to many qualifying considerations, which may well be urged upon the attention of the jury, whose province it is to weigh the evidence in estimating the amount of damages; but its competency is quite too clear to admit of a doubt. In the case at bar, the evidence, which was admitted at the trial, proved the pecuniary condition of the debtor three months prior to the time when he was liable to be taken in execution, and was not so remote as not to have a material bearing on the question of damages.

Exceptions overruled.

CALEB S. CARTER vs. GEORGE W. SMITH.

In an action against the maker of a promissory note, payable at a place certain, no demand at that place need be proved. Exceptions overruled with double costs.

THIS was an action of assumpsit, upon a promissory note, dated "Portland, December 23, 1848," and signed by the defendant, of which the following is a copy:—

"For value received, I promise to pay C. S. Carter, agent of the Protection Insurance Company of New Jersey, or order, six hundred and one dollars, in fourteen months from date, at either of the banks in Portland, and such additional premium, if any, as may become due on policy No. 276."

On the back of the note was the following indorsement: "Paid \$100, return premium."

At the trial in the court of common pleas, the plaintiff produced no evidence of a demand upon the defendant at any bank in Portland, to pay the note; nor did the defendant set up, or offer to prove, that he was ever present at any such bank with the money to pay the note. The defendant objected that the plaintiff must, in the first instance, prove such demand, but the presiding judge, *Mellen, J.*, overruled this objection.

A verdict was rendered for the plaintiff, and the defendant excepted to the above ruling.

G. H. Kingsbury, for the defendant.

J. P. Bishop, for the plaintiff, cited *Payson v. Whitcomb*, 15 Pick. 212; *Carley v. Vance*, 17 Mass. 389; *Ruggles v. Patten*, 8 Mass. 480, and claimed double costs, under Rev. Stat. c. 82, § 16.

SHAW, C. J. This is an action of *indebitatus assumpsit* upon a promissory note, made by the defendant to the plaintiff or his order, and payable at either of the banks in Portland, Maine.

In the court of common pleas, no evidence was adduced of any demand upon the defendant at any bank, nor did the de-

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defendant offer to prove that he was ever present at any bank with the money to pay the note; but the defendant objected that such a demand must, in the first instance, be proved. The court overruled the objection, and a verdict having been rendered for the plaintiff, the case comes before us upon exceptions to such ruling of the court.

Upon the question whether, in a suit upon a promissory note against the promisor, or upon a draft, against the acceptor, a demand must be proved, there have been conflicting decisions in England; the court of king's bench deciding one way and the court of common pleas, or the exchequer, the other.

An act was finally passed to decide the question.

It was early held here, in *Ruggles v. Patten*, 8 Mass. 480, that a demand was not necessary. It has been so held in other states, and in the supreme court of the United States, *Wallace v. McConnell*, 13 Peters, 136. Mr. Justice Story, in his work on promissory notes and bills of exchange, says he dissented from the opinion of the court in that case, but there is no note of his dissent preserved in the report.

The essence of the liability of the promisor is, his indebtedment to the holder of the note. The note is considered as an admission of debt, and that debt is not discharged merely by the omission to demand payment of it.

The want of a demand has its effect with regard to parties collaterally liable, like a drawer or indorser. To charge them, the holder must present his note to the acceptor, or maker, when it is due, and give them notice if it is not paid. It is sufficient for this purpose, where the note or draft is payable at a bank, that it be presented there, and that the banker finds, upon examining his books, that he has no funds to pay it.

But it is contended that the presence of the promisor at the bank, with his money, is in the nature of a tender. This may be so, and the tender may be good, if proved, but if the defendant means to rely on it, he must either plead it or give due notice otherwise of such intention. If he pleads it, and that he has always been ready, and proves it, it may bar the

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costs, but, as in all cases of tender, he must also bring the money into court. This view is substantially confirmed by the case of *Payson v. Whitcomb*, 15 Pick. 462. This would be the case if the note were payable at a place certain. But this is payable at any bank in Portland. We do not know how many banks there may be in that city, but the expression "either of the banks in Portland" indicates more than one.

Such a promise may impose a duty on the holder, under certain circumstances, to designate at what bank the note shall be paid; but it will be sufficient to decide that question when it shall arise.

The exception is overruled, and judgment will be entered on the verdict; and, as the exceptions appear to us to be only intended for delay, the plaintiff is entitled to double costs.

Exceptions overruled.

WILLIAM W. ALLCOTT vs. MALTBY STRONG.

If A. receives partnership notes in payment of his demand against the firm, and after its dissolution opens a running account with the continuing partner, by whose consent the amount paid by A. to take up said notes, upon their dishonor, is charged in such running account, it is the duty of the jury, in a suit by A. on such notes against the *retiring* partner, to apply any general payments made by the continuing partner to A. after the notes are so charged, to the earliest items of debit in said account; and if the general payments so made are sufficient to extinguish the notes and all earlier items in the account, to find such notes were paid.

The same rule applies to a suit by an indorsee of such notes taken when overdue.

A partnership must first be proved *aliunde*, before the declarations of one partner can affect the other; and evidence to show a continuance of a partnership, after it has been dissolved, with notice to the parties, must be as satisfactory as that required to show its establishment.

THIS was an action to recover the amount of three promissory notes, and was tried in the court of common pleas, before *Bigelow, J.*, under whose rulings a verdict was found for the defendant, and the plaintiff filed a bill of exceptions; the facts sufficiently appear in the opinion of the court.

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G. H. Preston, for the plaintiff.

R. Choate and *C. A. Welch*, for the defendant.

SHAW, C. J. This was an action of assumpsit, brought to recover the amount of three promissory notes; one a joint and several note, bearing date October 23, 1837, signed by Joseph Strong and Maltby Strong, for \$1,047.50, payable in six months; another bearing date 2d February, 1838, for \$1,035, in four months; and a third bearing date 15th February, 1838, for \$965, in five months. The last two notes were signed "J. & M. Strong," and all the three were payable to William Whitney, or order. The first note was signed by Joseph and Maltby Strong, in the proper handwriting of each; the two other notes, and the signatures at the bottom of each, were in the handwriting of Joseph Strong, who has been dead about three years. None of these notes were witnessed, and all were indorsed to the plaintiff, by William Whitney, without recourse to him, long after they became due. The defendant, among other grounds of defence, specified that the two last-mentioned notes were signed by the said Joseph Strong, without any authority, and that all the three notes had been paid by him.

At the trial, there was evidence tending to prove that J. & M. Strong were copartners, as millers, from June, 1835, to February, 1836, under the firm of J. & M. Strong, and that said firm was then dissolved.

The plaintiff called William Whitney, the payee, as a witness, who testified that he had dealt with the firm of J. & M. Strong, and that he closed their account on his books, on the 12th of August, 1836; that the balance of it due him was \$1,912.61, and that, for that sum, he received from said Joseph a draft, accepted in the name of J. & M. Strong, and a note, signed in the same manner, payable respectively in four and six months. The witness added, that from this time he had dealings with Joseph alone, and had an open running account against him on his books, which had never been settled; that when said draft and note fell due, they having been negotiated by him, he took them up himself, and charged them in the account against said Joseph; that said draft and note

were afterwards renewed by others, signed J. & M. Strong, which he received from Joseph Strong, and which were credited by him, when received, to said Joseph, and charged to him again, when not paid; that this was repeated down to the time when the two notes in suit were given, and that they also were negotiated, and afterwards taken up by said Whitney, and charged to said Joseph in account; that the said joint and several note was received by him from said Joseph, as a renewal of a note held by him against Joseph, and was duly credited to Joseph in the account, and then negotiated by the witness, and afterwards taken up by him and charged in the account to Joseph; that, so far as the witness knew, none of these three notes had been paid; that they always went forward in each year's account, and made part thereof, and had now become the oldest items therein.

Said Whitney's books of account, containing the account in question against Joseph, were put into the case by the plaintiff, and the defendant contended that the said notes, or some part of them, were proved thereby to have been paid, by legally appropriating the payments which were credited in said account.

Upon this point, the judge who tried the cause instructed the jury, that if, on inspecting the books, and upon the testimony of Whitney, they found that the said notes, or any of them, had been charged, as Whitney had testified, in general account, and had, by the acts and understanding of the parties, become proper items of account, and that payments had been credited by said Whitney to said Joseph, in the account in which said notes were charged as items, subsequently to such notes having so become items of account; and if there was no evidence to show that either Whitney or Joseph Strong had ever made, or intended to make, any particular appropriation of such payments, then it was the duty of the jury to apply such payments, so credited in account, to extinguish the earliest items of debit on said account; and if, by so applying such payments to the several items of debit, in the order of date, sufficient had been paid and credited to extinguish all items prior in date to said notes, and, in addition, to

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extinguish said notes, then their verdict must be for the defendant.

This point was elaborately discussed, and a great many authorities were cited in regard to it, but it seems to depend upon plain and well-settled principles. The outstanding debts of the dissolved firm were charged by their creditor, Whitney, to the partner who continued the business. Now, according to the rule laid down, in the absence of other proof, such a charge transfers the account to the party undertaking to pay it. The earliest credits in the account must be applied to meet the earliest debits, and if those debits are joint, they are met and extinguished by the credits. This was decided in *Clayton's case*, 1 Mer. 572; *Bodenham v. Purchas*, 2 Barn. & Ald. 39; *Farnum v. Boutelle*, 13 Met. 159. It is the ordinary way in which accounts are managed, at the dissolution of copartnerships. The counsel referred to a case where, by a mere entry in the creditor's books, an account was altered by debiting the new firm and crediting the old, without notice to either, and where yet, upon failure of the new firm, it was held that the creditor might recharge the account to the old firm. This was the case of *Barker v. Blake*, 11 Mass. 16, in which the evidence was, that the defendant was the surviving partner of a firm, consisting of himself and the elder and the younger Dix, with whom the plaintiff once had dealings; and that, at one time, the plaintiff, upon receiving certain goods in pledge, from the younger Dix, credited the firm with the balance of his account with them, and charged it to Dix alone, but without the privity of any of the debtors, and subsequently, after having given up a part of the pledge, recharged what remained due of the old account to the firm. This case was decided upon the ground, that entries in a merchant's books are his private memoranda, and that, when made by him without the knowledge of other parties, those parties ought, in general, to acquire no rights from the manner of making them. But that is very different from a case where the charges are transferred by consent of all parties, especially if enough has also been received, from the party last charged, to pay them. In the case before us, the

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notes were antiquated and had been long overdue, before they were indorsed to the plaintiff. He, therefore, stands on no better ground respecting them than did Whitney himself; and the latter had charged them to Joseph Strong alone, and had received from him enough to pay all the earlier items, including these notes. We think, then, the instruction of the court below was right; if the jury believed the facts to be as above stated, the original payee could not recover; and the indorsee of overdue notes had no better right than the indorser.

There were many other grounds taken in defence, and much evidence produced on both sides. The plaintiff produced the deposition of Henry B. Williams, to prove, amongst other things, the partnership of J. & M. Strong, which was denied by the defendants; and he proposed to read the answer of said Williams to an interrogatory of the plaintiff, which answer was in these words: "I understood that Maltby Strong was in partnership with Joseph Strong, a portion of the time, from 1835 to 1840; how much of the time, I can't say; I knew of the partnership existing in 1837, from information derived from Joseph Strong more particularly. Joseph was a brother of Maltby; he died, I think, two or three years ago. Joseph Strong called on me, I think, in the fall of 1837, (I have no doubt about the time,) to indorse a note, purporting to be made by J. & M. Strong; in the conversation which followed his request for me to indorse, Joseph Strong stated that the firm still existed. I am able to fix the period, because it was soon after I got my new mill in operation, on Brown's race. Joseph stated, that he wanted to get the note discounted at the Monroe Bank."

The defendant objected to the reading of so much of said answer as purported to be information received from Joseph Strong, and the judge sustained the objection, and to this ruling the plaintiff objected. The jury found a verdict for the defendant. The plaintiff excepts to the foregoing ruling, and to the instructions given to the jury.

The question was, whether the partnership between the brothers existed at that time; and the argument of the plain-

tiff was, that, when they were once proved to have been partners, the admission of one would conclude the other. This is true where the partnership has been proved *aliunde*. It is the same in cases of conspiracy; the fact of a conspiracy existing between the parties being once proved, what is said by one will affect the rest; but the conspiracy must be first proved to have existed between the parties. The objection here is, that, in order to show Maltby to be a partner with Joseph, they first offer Joseph's declarations to prove the partnership, and then seek to affect Maltby by other declarations of Joseph. If such evidence were admissible, any man might affect any other by his own declarations. The partnership must first be proved, before the declarations of one partner can affect the other.

The evidence to show the continuance of the partnership, after it had once been dissolved, with notice to the parties, must be as satisfactory as that which is required to show its establishment. It was argued that, when a partnership is once shown to exist, its dissolution must be shown by evidence *aliunde*, before one partner can claim to be exempt from the acts or declarations of the other; but that is a mere question of notice, and Whitney, in this case, had full knowledge of the dissolution. Of course, if he had had no notice of the dissolution, after having had dealings with the firm, both of the members might have been bound by the acts of one, but that is not this case.

We think the decision of the court of common pleas right upon both points, and judgment must be entered for the defendant.

Exceptions overruled.

Rich v. Jones.

THOMAS P. RICH vs. SAMUEL D. JONES.

In an action of assumpsit, a person in the employ of the plaintiff, whose compensation is fixed at a certain percentage of net profits, is rendered a competent witness for the plaintiff by a release of all interest in the amount which may be recovered in the suit; it not having been made to appear, by examination of the witness on the *voir dire* or otherwise, that the plaintiff, if he should lose his case, would have a legal right to charge the costs and expenses thereof on the general fund, and thus diminish the compensation of the witness.

The filing of new counts, after an auditor has made his report, is no proof that the trial at bar was of a different cause of action from that which appeared on the record when the auditor was appointed. No exceptions having been made to the filing of the new counts, it must be understood, in this court, that they were for the same cause of action as the original counts.

An auditor, appointed under Rev. Sts. c. 16, in an action to recover the value of certain leather delivered to the defendant, to be made into shoes, and alleged to have been converted by him to his own use, may find, as a fact, whether any thing, and how much, is due from the defendant to the plaintiff; and his report on this question is *prima facie* evidence before the jury.

If a special demand be not necessary to the maintenance of the action, it need not be proved, although directly alleged.

A declaration contained four special counts, setting forth a contract that the plaintiff agreed to furnish to the defendant, leather to be manufactured into shoes, for which the plaintiff was to pay the defendant a certain compensation. One count alleged, as a breach of the contract, that a portion of leather the defendant had converted to his own use, contrary to the contract, whereby the same was wholly lost to the plaintiff. Another count averred a failure by the defendant to manufacture and return a part of the leather, either manufactured into shoes, or in any other way, and that the same was wholly lost to the plaintiff by reason of such breach of contract. Another count set forth that the defendant so negligently and unskillfully conducted himself in the business, that, by reason thereof, a portion of the leather was wasted and lost. The other count alleged a conversion of the leather by the defendant, by permission of the plaintiff, and an agreement, in consideration thereof, to pay the plaintiff the reasonable value thereof. It was held, that these were all proper counts in assumpsit, and that it was immaterial whether the breach was caused by tortious acts, which would have enabled the plaintiff to maintain an action *ex delicto*.

No exception can be taken to the refusal of a judge to allow the counsel for the defendant, on opening his case, to comment on the plaintiff's evidence.

In an action to recover the value of certain leather delivered to the defendant, by the plaintiff, to be made into shoes by the defendant, the plaintiff alleging a conversion of a portion of the leather, and the defendant averring that it had all been returned in the shoes manufactured; some of the defendant's witnesses having described leather which *they supposed* had been received by the defendant of the plaintiff, the defendant proposed to ask another witness, who was called as an expert, how much leather, such as described by the above witnesses, it would take to make a certain number of pairs of shoes; and it was held that the refusal of the judge to allow this question to be put was right, it not appearing that the witness had the means of forming the opinion desired.

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THIS was an action of assumpsit, tried before *Mellen, J.*, in the court of common pleas. The writ contained the usual general counts and a count upon an account annexed, with a specification of claim, the same as the account annexed, which was as follows :—

“ Defendant to plaintiff Dr. in 7,123 lbs. sole leather, at 14 cts. per lb. \$997.34.”

Subsequently, by leave of court, four special counts were filed, setting forth a contract between the plaintiff and defendant, in which it was alleged that the plaintiff agreed to furnish to the defendant the requisite leather, &c., to be by him manufactured into shoes of various kinds, and which leather the defendant was to take at the plaintiff's store, and return to the plaintiff at his store when manufactured, for which the plaintiff was to pay the defendant the expenses of bottoming and fitting the shoes, and the sum of seven cents per pair, in full for all other services in the manufacture and return. These counts alleged various breaches of the contract. One of them alleged that a large portion of sole leather, delivered to the defendant for the above purpose, the defendant had converted to his own use, contrary to the above contract, whereby the same was wholly lost to the plaintiff; alleging also the value of the leather so converted. Another of the counts alleged a failure on the part of the defendant to manufacture and return a large part of the sole leather so delivered by the plaintiff to him, either manufactured into shoes, or in any other way, alleging the value of the leather, and that the same was wholly lost to the plaintiff by reason of such breach of contract.

Another of the counts alleged that the defendant so negligently and unskilfully conducted himself in such business, that, by reason thereof, a large portion of the sole leather so delivered to him by the plaintiff was wasted and lost. There was also another count, alleging a conversion of the leather by the defendant, by permission of the plaintiff, and an agreement, in consideration thereof, to pay the plaintiff the reasonable value thereof, alleging such value.

The defendant pleaded the general issue, and filed a speci-

fication of defence, alleging a return to the plaintiff, in shoes, of all the leather delivered.

When the action was commenced, the writ contained only the general counts and that upon the account annexed. After two of the special counts had been filed by leave of court, the case was referred to an auditor, who made a report. Subsequently thereto, by leave of court, the remaining special counts were filed, and one of the prior counts amended.

The third term after the auditor's report was returned and filed, the cause came on for trial, when the plaintiff offered the report in evidence, to which the defendant objected; first, because it appeared by the report, that the auditor had erred in admitting the testimony of two of the plaintiff's witnesses. It appeared that these witnesses were in the employment of the plaintiff at the time of the contract in question, and, by agreement with the plaintiff, were to receive, as compensation for their services, a certain portion of the net profits of the business; but were under no agreement to pay any losses, any further than such losses went to diminish the amount of such profits. It also appeared that the business was carried on solely in the name of the plaintiff; and that, upon the objection being taken before the auditor, a release had been executed by the witnesses. This objection to the auditor's report was overruled by the judge.

Secondly, the report was objected to, because the plaintiff had filed the amendments above mentioned since the hearing before the auditor. This objection was overruled by the judge, it appearing that no motion had been made by the defendant to recommit the report to the auditor for further hearing, and the defendant declining to move for further time to make such motion.

Thirdly, because the auditor erred in reporting as he did, how much was due from the defendant to the plaintiff on a statement of accounts between the parties, instead of simply finding the amount of leather delivered, and the number of shoes returned.

The auditor's report was then read to the jury.

The plaintiff introduced evidence that, in the exercise of

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ordinary care and skill, it would require only $1\frac{1}{2}$ or $1\frac{1}{3}$ lbs. per pair of sole leather, to make the men's shoes or brogans returned by the defendant, there being no dispute about the amount of sole leather required to make the other kinds of shoes returned by the defendant; and that, at that rate or estimate, it did not require so much sole leather, to make the shoes returned by the defendant, as had been delivered to him by the plaintiff; and that there was, therefore, a large amount unaccounted for. There was no evidence showing the manner in which the defendant conducted the business of manufacturing the shoes. The plaintiff also gave evidence of the contract, as alleged in the declaration; and it also appeared by the same evidence, that the seven cents per pair, named in the agreement, for the defendant's services, &c., were to be paid, six cents in money, and one cent upon each pair by allowing the same on account of a prior debt from the defendant to the plaintiff. There was evidence that, on such prior debt, the plaintiff had received a dividend. The declaration contained no allegation touching such method of paying the seven cents per pair. The defendant objected that this constituted a variance, but this was overruled by the judge.

The plaintiff also gave evidence that, prior to the commencement of this suit, he demanded a return of the remaining leather or shoes, and that the defendant replied, that the whole of the leather delivered to him had been returned in the shoes that the plaintiff had received.

The defendant's counsel, in opening his case to the jury, proceeded to comment, by way of argument, upon the testimony already offered by the plaintiff; but the judge declined to permit him to argue such evidence and facts to the jury, and ruled that the proper course was for the defendant's counsel, in opening, to confine himself to a statement of the grounds of the defence, and of the facts which he expected to prove. There were two counsel engaged in the defence. To this ruling the defendant excepted.

Some of the defendant's witnesses described the sole leather which they supposed had been received by the defendant from the plaintiff. The defendant subsequently called one James

W. Soule, who testified that he was a cutter of shoes, and had been so for ten years; and that, in his opinion, it would take from 160 to 170 pounds of sole leather, of fair quality, to make one hundred pairs of men's kip brogans, of first quality. The defendant then proposed to ask the witness whether he had heard the testimony of two of the defendant's witnesses, who had testified respecting the plaintiff's leather, and how much leather, such as described by them, it would take to make 100 pairs; whether, in making this estimate, he founded such estimate on such leather; and if not, wherein it differed; which questions were objected to by the plaintiff, and the objection was sustained.

After the testimony was closed, the plaintiff elected to waive the general money counts, and to rely upon the special counts filed in the case.

The defendant then requested the judge to instruct as follows, namely:—

First, that there was a variance between the plaintiff's allegation in his declaration and his proof, which was material in this, that the declaration alleges that the defendant was to receive seven cents per pair for his services, &c., and the proof was that he was to receive six cents in money and one cent upon a previous debt.

Second, that there was no special demand alleged in the plaintiff's declaration, and therefore the plaintiff could not recover upon the ground of a demand and refusal, or a conversion evidenced by that.

Third, that the plaintiff could not recover for the sole leather, or any part of it, in this action; and if they found that it had been converted by the defendant, or had not, for any cause, been all returned by him in the brogans, then he could not recover in this action.

Fourth, that if they found a conversion of the sole leather, unless they found that the same had been sold by the defendant, or converted into money, the plaintiff could not waive the tort and sue in assumpsit.

The judge declined so to instruct the jury, but did, among other things not excepted to, instruct the jury that there was

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no material variance between the plaintiff's proof and declaration; that the demand was sufficiently alleged in the plaintiff's declaration; and that the plaintiff could recover the value of the leather not returned, in this form of action, if the jury found that the defendant had wasted the leather in manufacturing, or had lost it from want of ordinary care, or had converted it to his own use, whether the defendant had converted the leather into money or not; and that the plaintiff might recover in this form of action, although they should find that the defendant had the leather on hand at the time of the making of such demand.

The judge instructed the jury to find whether the defendant had the leather not returned and on hand, at the time of the demand, if they found that the whole amount had not been returned by him to the plaintiff. The jury rendered a verdict for the plaintiff; and, on being inquired of, informed the judge that they found that the defendant had not the leather on hand at the time of the demand.

The defendant alleged exceptions.

N. Richardson, for the defendant, cited *Baxter v. Buck*, 10 Verm. 548; *Robbins v. Otis*, 1 Pick. 368; *Penny v. Porter*, 2 East, 2; *Whaley v. Pajot*, 2 B. & P. 51; *White v. Wilson*, 2 B. & P. 116; *Hockin v. Cooke*, 4 Term R. 314; *Wallis v. Scott*, 1 Strange, 88; *Birks v. Trippet*, 1 Saunders, 32, and note, 2; *Bach v. Owen*, 5 Term R. 409.

M. S. Clarke, for the plaintiff, cited *Dewey v. Cabot*, 6 Met. 82; *Bradley v. White*, 10 Met. 303; *Lord v. Baldwin*, 6 Pick. 348; *Clarkson v. Carter*, 3 Cowen, 84; *Burstow v. Gray*, 3 Greenl. 409; *Loyd v. Archbowle*, 2 Taunt. 324; *Leveck v. Shaftoe*, 1 Esp. 468; *Jones v. Stevens*, 5 Met. 373; *Barnard v. Stevens*, 11 Met. 297; *Bradley v. Clark*, 1 Cush. 293; *Fox v. Hazellon*, 10 Pick. 275; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81; *Hobart v. Hilliard*, 11 Pick. 143; *Dyer v. Rich*, 1 Met. 180, 190; 1 Chitty Pl. 362; *Bristow v. Waddington*, 2 New Rep. 355; *Amory v. Brodrick*, 5 B. & Ald. 712; *Bowdell v. Parsons*, 10 East, 359; 28th and 30th rules of the court of common pleas; 1 Chitty Pl. 121.

METCALF, J. 1. The court are of opinion that the testimony

of the two witnesses, who had been in the employment of the plaintiff, was rightly received by the auditor. For aught that appears, the release given by them to the plaintiff rendered them competent. The defendant's counsel suggests, "that the plaintiff, if he should lose this case, would have a legal right to charge the costs and expenses thereof on the general fund, and thus decrease the witnesses' profits." But we do not know this. If it were so, it should have been made to appear by examination of the witnesses on the *voir dire*, or otherwise.

2. The filing of new counts, after the auditor had made his report, is no proof that the trial at bar was of a different cause of action from that which appeared on the record when the auditor was appointed. It must be understood, in the present stage of the case, that all the counts were for the same cause of action; no exception having been made to the filing of the last. Amendments are often allowed after all the evidence is introduced; sometimes after verdict. The Rev. Sts. c. 100, § 22, authorize amendments at any time before judgment rendered.

3. The objection, that the auditor had no authority to find the facts which he has reported, is answered by the decision in the case of *Locke v. Bennett*, 7 Cush. 445.

The auditor's report was therefore rightly admitted in evidence to the jury.

4. It is objected by the defendant's counsel, that "if the plaintiff relied on a special demand, he should have alleged it specially; and that it was not enough to allege a general request, without time or place." Doubtless the law is so, when a special demand is necessary to the maintenance of the action. But, upon examining the various counts in the declaration, we find that neither of them so sets forth the cause of action that it was necessary to allege a special demand. And though such demand is averred in one or two of the counts, yet, as it was a needless averment, it was not necessary to prove it. 1 Saund. Pl. & Ev. (2d ed.) 213. Nor did proof, at the trial, of such needless demand, make any of the counts bad for not averring it.

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5. It has been argued for the defendant, that there was a variance between the contract proved and that which is alleged in some of the counts. It was said that the allegation that the plaintiff was to pay the defendant for his work on the shoes, seven cents per pair, was not sustained by evidence that the plaintiff was to pay six cents in money and one cent by allowing the same on a prior debt, which the defendant owed the plaintiff. We were not much impressed by this argument, and have not deemed it necessary to decide whether it has any force. For if the evidence did not support the counts that alleged the price which the plaintiff was to pay, yet it supported the other counts, which alleged that the defendant undertook, &c., "for a certain reward or compensation to be paid him by the plaintiff therefor." There are precedents for such counts in the books of entries, and the defendant has not, in any stage of this case, taken exceptions to them.

6. It is objected, that the plaintiff cannot recover in an action of assumpsit, if the defendant converted the leather to his own use, or did not, for any cause, return the whole of it. But, upon inspecting the counts, we are of opinion that they are all proper counts in assumpsit, and that the cause of action therein set forth is a breach of contract. We are also of opinion that it is immaterial whether that breach is or is not alleged or proved to have been caused by tortious acts, which would have enabled the plaintiff to maintain an action *ex delicto*. *Church v. Mumford*, 11 Johns. 479; 2 Comyn on Contracts, (1st ed.) 559.

7. The refusal of the judge to permit the counsel, who opened the defence, to comment on the evidence introduced by the plaintiff, is no just cause of exception. It was a matter within the judge's discretion; and we think he wisely exercised that discretion in this instance. Two counsel conducted the defendant's cause at the trial; and no right of his was violated, by confining the argument on the evidence to the counsel who closed the defence. We know of no law which, in a civil action, entitles a party, as of right, to two arguments on the same matter.

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8. We see no error in the judge's refusal to permit the questions to be put to the witness, Soule, which the defendant proposed to put. The auditor had stated in his report, which was before the jury, that the defendant had made and delivered to the plaintiff about fifteen thousand pairs of men's kip brogans, of first quality, and about four thousand pairs of boys and youths' kip brogans. The defendant called Soule as an expert; and he testified that, in his opinion, "it would take from 160 to 170 pounds of sole leather, of fair quality, to make 100 pairs of men's kip brogans of first quality." The defendant then wished to show that the plaintiff's leather was such as would require more than 160 or 170 pounds to make 100 pairs of such brogans; and, for this purpose, he proposed to put to Soule the questions which the judge would not permit to be put. Now if the witness might have been rightly permitted, in any supposable state of the evidence, to give an opinion on that matter, it seems to us very clear that he could never be so permitted, unless it should first appear that he had the means of forming an opinion. It does not appear, in the present case, that he had such means. The exceptions state, that "some of the defendant's witnesses described the sole leather which they supposed had been received by the defendant of the plaintiff;" and that the defendant proposed to ask Soule "whether he had heard the testimony of two of the defendant's witnesses, who had testified respecting the plaintiff's leather." This question assumed that the witnesses, to whose testimony his attention was directed, had described the plaintiff's leather; whereas the fact stated in the exceptions is, that the witnesses described leather which they "supposed" to be the plaintiff's. The judge may have been of opinion that the identity of the leather was not sufficiently established to warrant the expert to give an opinion on the questions propounded to him. Besides; it does not appear how much leather, in the defendant's possession, was examined by the two witnesses. Yet the auditor's report states that the defendant received from the plaintiff, at different times, nearly fifteen tons of sole leather, and that he made nineteen thousand pairs of brogans, of different kinds. It

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may be that the witnesses examined so little of the leather (even if it were certainly the plaintiff's,) that the expert could not properly form an opinion, which ought to be given to the jury, on the questions which were put to him. Whatever was the ground on which these questions to Soule were rejected, the exceptions do not show that the rejection was wrong.

Judgment on the verdict

JACOB S. GOULD & others vs. THE NORFOLK LEAD COMPANY.

An agent, acting under a parol authority, is a competent witness to prove his own agency.

To prove the authority of an agent of a corporation to accept drafts for the company, it was proposed to introduce the agent's testimony that he had paid, as such agent, drafts and orders drawn on the company, and not previously accepted; and it was held, that, if such drafts and orders might be presumed still to exist, it was to be presumed that they were held by the company, and notice should first have been given to the company to produce them.

The payment of an unaccepted draft upon a corporation, by its agent, is no evidence of his authority to accept drafts upon the corporation; and the fact that such acceptor acted as general agent, has little tendency to show such authority.

A recorded vote of the directors of a corporation, being a written instrument, must be construed by its terms alone, with reference to the subject-matter to which it applies; and parol evidence is not admissible of the sense in which it was understood by a director.

A draft on a corporation was accepted by their agent, payable "when in funds," after a certain other draft upon them should have been paid. In an action on the draft, an auditor appointed to state the accounts between the drawer and the corporation, reported that the corporation "were in funds;" and it was held, that this was a statement of fact, within his province, and that his report was *prima facie* evidence of such fact.

A witness may be discredited by evidence that he has made a different statement on a former occasion, although the precise language then used by him cannot be shown; and he need not be first asked, whether he has ever testified differently. But such previous statement cannot be used to prove the facts to be as then stated by the witness.

THIS was an action of assumpsit, to recover the amount of a draft alleged to have been accepted by the defendants, a corporation duly established by law. The draft was in the following words and figures:—

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“\$850.

Boston, May 10, 1847.

Please pay J. S. Gould & Co. or order, eight hundred and fifty dollars, value received, and charge the same to account of yours,

S. ALBERT COX.

To Norfolk Lead Co.”

“Accepted thus:—

May 15, 1847.

Accepted, to pay when in funds, after paying draft in favor of Fulton Iron Foundry, heretofore accepted.

For Norfolk Lead Co.

N. ADAMS, Agent.”

The writ was dated May 15, 1848. The defendants pleaded the general issue, and denied, first, that Adams had authority to make such acceptance; and, secondly, that the defendants were ever in funds to pay the acceptance, according to the tenor thereof.

The case involving an investigation of accounts between Cox, the drawer of the draft, and the defendants, it was sent to H. G. Hutchins, Esq., as an auditor, to state those accounts, and his report was read in evidence by the plaintiffs.

For the purpose of showing that Adams was an agent of the corporation, and, as such, authorized to make the acceptance in question, the plaintiffs offered Adams as a witness to those facts. The defendants objected to the competency of the witness, on the ground of interest, alleging that he would be himself personally liable to the plaintiffs, if he had made the acceptance without authority. But the presiding judge, *Mellen, J.*, overruled the objection, and permitted the witness to testify to his agency and authority in the premises.

Adams testified that he had paid, as agent of the defendants, numerous orders or drafts drawn on the company, to a large amount in the aggregate, in favor of other persons than the plaintiffs, which had not been previously accepted by the defendants. The defendants objected to this evidence, because it was an attempt to prove the contents of written instruments, without proving the loss of the instruments, or giving the defendants notice to produce them; and because the payment of drafts had no tendency to show authority to accept drafts. The judge overruled the objection, and permitted the evidence to go to the jury, and instructed the

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jury, that the payment of a draft not accepted included its acceptance. For the purpose of showing that Adams was an agent of the defendants, and, as such, pledged the credit of the company in some form, and with its consent or subsequent ratification, the plaintiffs introduced witnesses, who testified that Adams, as agent of the defendants, had contracted with them, the witnesses, for wood, blacksmith's work, carpenter's work, &c., on a credit, and that their bills were subsequently paid by the defendants. The defendants objected to this testimony as immaterial, but the judge ruled that the evidence was competent, though remote, and permitted it to go to the jury.

The defendants introduced in evidence a contract in writing between Cox and the defendants, under which Cox manufactured the machinery and did the work which constituted the account between Cox and the defendants, which was sent to the auditor to be stated and reported upon. The contract was signed and executed by Adams, for and in behalf of the defendants. It was offered by the defendants for the purpose of showing that there were overcharges in the account of Cox. The plaintiffs contended that this contract, being executed by Adams as agent of the defendants, was evidence that Adams had authority to use the credit of the defendants, inasmuch as this contract did pledge their credit, and they claimed the performance and fulfilment of the contract on the part of Cox. The defendants then read a vote from the records of their directors, which was in the following words: "Voted, that the proposition of Mr. Cox, for building machinery, &c., be referred to Mr. Adams." They also introduced a written proposition made by Mr. Cox, which was different from the terms of the contract, as executed between Cox and the defendants; and then requested the judge to rule that this vote was a sufficient authority to Adams to make and execute with Cox the contract which was finally executed between him and the defendants, and, therefore, had no tendency to show the authority of Adams to pledge the credit of the defendants. The judge refused so to rule, and, on the other hand, ruled that the vote of the directors authorized Adams

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to consider and report upon the proposition of Cox, and not to make and execute a contract, as would appear by the terms of the vote. The defendants then asked leave to prove by the directors, who had made themselves competent as witnesses by selling and transferring their stock in the company, that they understood the vote, when it was passed, to confer upon Mr. Adams full authority to make and execute a contract. Upon objection by the plaintiffs, the judge refused to admit the testimony, because the vote was in writing, and could not be varied by parol testimony.

The defendants objected to the auditor's report, because the auditor stated the fact that the defendants were in funds; alleging and requesting the judge to rule, that it was not competent for the auditor to pass upon this question; and, therefore, that that part of his report which stated that the defendants were in funds should be stricken out. The judge refused so to rule, and, on the other hand, ruled that it was within the province of the auditor to pass upon that question, and that his report was *prima facie* evidence of the facts within his province to report.

Edward Crane, one of the directors of the company, was a witness on behalf of the defendants, at the hearing before the auditor and at the trial in the court of common pleas. Charles E. Parsons was introduced by the plaintiffs, and testified at the trial, that Crane had testified to the same subject-matter, in a certain other trial between other parties, and he stated substantially what Crane's testimony was on that other occasion. Parsons testified that he could not give the precise and exact words used by Crane in his testimony on the former occasion, but he could give the substance and import of them. The defendants objected to the admission of the testimony of Parsons, because he could not state the precise words, as they had been used by Crane, and because the plaintiffs had not interrogated Crane, while on the stand as a witness, whether he had ever testified differently from what he then testified. The judge overruled both objections, and permitted Parsons to testify.

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The jury returned a verdict for the plaintiffs, and the defendants brought the case to this court by exceptions.

L. Mason, (with whom was *R. Choate*,) for the defendants, cited 1 Greenl. Ev. §§ 395, 416, 417, 260-563; *Byles on Bills*, 15; *Hogg v. Snaith*, 1 Taunt. 347; *Hay v. Goldsmidt*, cited in *Hogg v. Snaith*, 2 Archbold's N. P. 7, 9; *Attwood v. Munnings*, 7 B. & C. 278; *Davidson v. Stanley*, 2 Man. & Grang. 721; *Atkinson v. St. Croix Manufacturing Co.* 11 Shepley, 171; *Angell & Ames on Corp.* (5th ed.) § 291 a; *Allen v. Hawks*, 11 Pick. 359; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81, 97; *Whitwell v. Willard*, 1 Met. 216; *Jones v. Stevens*, 5 Met. 373; *Taunton Iron Co. v. Richmond*, 8 Met. 434; *Bradley v. Clark*, 1 Cush. 293.

J. P. Healy, for the plaintiffs, cited 1 Greenl. Ev. §§ 416, 417; *Putnam v. Tillotson*, 13 Met. 517; *Rice v. Gove*, 22 Pick. 158; *Jones v. Stevens*, 5 Met. 373; *Tucker v. Welsh*, 17 Mass. 160.

SHAW, C. J. This was an action of assumpsit, to recover the amount of a draft alleged to have been accepted by the defendants.

The suit was brought May 15, 1848, and was resisted on the grounds that Adams had no authority to accept the draft, so as to bind the corporation; and, secondly, that the acceptance was conditional, and the corporation had not received funds to pay the acceptance, according to its tenor. Inasmuch as it became necessary to ascertain the state of Cox's accounts with the defendants, the account was referred to an auditor, whose report is a part of the case. It comes before the court on various exceptions, taken by the defendants.

1. At the trial in the court of common pleas, the plaintiffs offered Adams as a witness, to prove that he was an agent of the corporation, and, as such, authorized to accept the draft in question; to which the defendants objected. The court, however, overruled the objection, and permitted him to testify to his agency and authority. This, we think, was according to the rule, that an agent, acting under a parol authority, is competent to prove his own agency by his testimony; a rule founded on convenience and necessity, and supported by general usage, and it does not come within any of the exceptions to the rule.

2. The agent testified that he had paid, as agent of the company, numerous drafts and orders drawn on them, and not previously accepted by them. This evidence was objected to, because it was attempting to prove the contents of written instruments without showing their loss, or giving notice to the defendants to produce them; and because the payment of such drafts had no tendency to prove authority to accept drafts. The court overruled these objections, and instructed the jury, that the payment of a draft not accepted included its acceptance, and, therefore, was evidence of an authority to accept drafts.

As to the first part of the objection, it is obvious that, if the drafts were thus paid, they were paid by the corporation, and for their account. A corporation must act by and through agents, directors, or trustees, because it can act in no other way. Perhaps the presumption is that these drafts, having been so paid, were cancelled or destroyed; but if otherwise, and if they may be presumed still to exist, it is to be presumed that they are held by the company, and could be produced by them, and so notice to produce should have been first given. If the case depended upon this point, we should say sufficient notice for this purpose might have been given at the trial; and, in a new trial, a very short notice would probably be deemed sufficient.

3. The second branch of this objection is entitled to more consideration. The instruction of the court, that the payment of a draft not accepted included its acceptance, and was evidence of an authority to accept drafts upon the company, was, in our opinion, incorrect in point of law. The acceptance of a draft is an executory undertaking to pay it at a future day, and the authority to make such an agreement is not incident even to the authority of an agent to purchase and pay for goods. The authority to accept is one of a very high character, particularly in the case of a trading corporation, to whose business credit, and the use of that credit, is constantly necessary. It has been argued, that such authority may be inferred from the course of trade, and the payment of unaccepted drafts upon the company on other

occasions. But this implication does not follow from such payments; for, either the agent had funds of the company for the purpose of paying such drafts; which does not imply that he had authority to pledge their credit; or he paid them from his own funds, relying on the credit of the company, and their previous undertaking and liability to reimburse him for all his advances, which implies no authority whatever to bind them to a future payment of money, by an acceptance. I shall not go into an examination of the cases on this subject, but will refer to that of *Webber v. Williams College*, 23 Pick. 302, where the question was much considered, and many cases were cited.

The case of *Emerson v. The Providence Hat Manuf. Co.* 12 Mass. 237, goes to the point that, constituting one a buying and selling agent of a trading company does not imply authority in him to give the negotiable note of the company.

In the case before us, the agent, by accepting the draft, bound the corporation, if he bound them at all, to account with another person than Cox, which might be very injurious to them, as it would exclude them from setting off what might be due to them from him. The authority to pay drafts applies only to that specific class of transactions, and, therefore, there can be implied from it no authority to agree to pay at a future day. If Adams paid the drafts from his own funds, he did so relying on his own authority, as agent, to that extent, to reimburse himself, or on the subsequent ratification of his acts by the company, as otherwise he was without remedy; for no man can make himself the creditor of another without his consent, express or implied. Without such consent, he pays in his own wrong.

4. The next point is, that the plaintiff's counsel was permitted to argue from the fact, that the agent had made a contract with Cox for building certain machinery for the defendants, that he was authorized to pledge the credit of the company by his acceptances. We think the evidence had some tendency to prove that he was a general agent of the defendants, and, in that respect, was competent, though certainly it was very remote. The name of general agent might

imply, that he had authority to purchase materials for carrying on the defendants' business, but it had little tendency to show authority to accept drafts for them.

5. The defendants then put in a vote of the directors of the corporation, that the proposition of Mr. Cox for building machinery *be referred* to Mr. Adams, and put in also a written proposition, made by Cox, which was different from the terms of the contract afterwards executed between him and the defendants; and the defendants' counsel asked the court to rule, that this vote was a sufficient authority to Adams to make and execute the contract which was finally made, and, therefore, had some tendency to show an authority in Adams to pledge the defendants' credit. But the court, on the other hand, ruled, that the vote of the directors merely authorized Adams to consider and report upon the proposition, and not to make a contract. The defendants then asked leave to prove by the directors, who had sold and transferred their stock in the company, that they understood the vote to confer upon Mr. Adams full authority to make and execute the contract. This the court refused to do, because the vote was in writing. This, we think, was correct; because the vote was a written instrument, and must be construed by its terms alone, with reference to the subject-matter to which it applies. If the terms of the vote imported the authority to make the contract, no parol testimony was necessary; if it did not, such testimony could not be competent to control and vary those terms.

6. The defendants' counsel objected to the auditor's report, because it stated that "the defendants were in funds," and requested the court to rule, that it was not competent for the auditor to pass upon that question, and that that part of the report which contained such statement should be stricken out; but the court ruled that it was within the province of the auditor to pass upon that question, and that the report was *prima facie* evidence of the facts within his province to inquire into.

Now, what does this objection apply to? The objection is, that the auditor expresses an opinion upon a question of

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fact, a question which it is for the jury to pass upon ; but, in looking at the report, we find it is not open to that objection. The auditor was appointed to state the account between Cox and the defendants, to see what money he had earned under his contract with the defendants, and what money of his was in their hands, to answer his drafts upon them ; to see if the balance in their hands, after deducting a sufficient sum to pay the Fulton Iron Foundry, was sufficient to pay this draft of the plaintiffs. He found that the balance was sufficient, and reported, in the language of the acceptance, that they were in funds ; that is, in the condition indicated by the acceptance as that in which their liability to the plaintiffs should take effect. This result depended upon the state of the accounts between the parties, and was a matter of fact, not the expression of an opinion. It was not an independent substantive statement of fact, but the result of the inquiry which he was directed to make, into the state of the accounts, and so was within his province. The items of the account, from which this result was drawn, were submitted, at the same time, for the examination of all parties, by which the correctness of such result could be readily tested.

7. Edward Crane, one of the directors of the company, was a witness introduced at the hearing before the auditor, and at the trial in court, by the defendants, and Charles E. Parsons was called by the plaintiffs, and testified, at the trial, that Crane had testified concerning the same subject-matter, on another occasion, in a certain trial between other parties ; and he stated substantially what his testimony then was. The defendants' counsel objected to the admissibility of this testimony, because the witness could not state the precise words used by Crane on that occasion, and because the plaintiffs' counsel had not interrogated Crane, while upon the stand, as to whether he had ever testified differently from what he then testified. These objections the court overruled, and we think very properly. This point of practice is well settled, and the ruling conforms entirely to the practice in this commonwealth. Evidence respecting the testimony of a deceased witness, to which the counsel taking this exception manifestly

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referred, stands upon quite other grounds. If it is practicable to show the precise words of the deceased person, so as to give his own testimony exactly, then it is competent, otherwise not. 1 Greenl. Ev. §§ 163, 165. But the present case depends on an entirely distinct rule. It is substantially an impeachment of the credibility of the witness. It cannot be used to prove the facts to be as stated by the witness on the previous occasion; but merely to show that he then gave a different account of the same transaction. This affects the value of his testimony. It shows he has made a statement conflicting with the one he gives at the trial. If under oath on the prior occasion, the evidence against his credibility is so much the stronger, but it is not necessary that he should have been sworn. The fact that he has stated the facts differently, shows either a failure of memory, that he has forgotten what he once knew, or else it shows a want of integrity, and either way it impairs the value of his testimony. But it is no evidence whatever that the facts are as he formerly stated; and, though appeals are sometimes made to a jury that it is so, it is the province of the court to inform them that it is not so. As to requiring a witness to be asked, while testifying in chief, whether he has ever made a different statement, as a basis for afterwards contradicting him, that is the English rule, but we have always adopted a different rule. After it has been shown, however, that the witness has made conflicting statements, he may be recalled for the purpose of explaining or reconciling them.

These are all the grounds necessary to be considered. The verdict must be set aside, and a new trial had in this court.

Exceptions sustained.

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LEMUEL GILBERT vs. CHARLES G. THOMPSON.

A judgment in a former action is conclusive, only when the same cause of action was adjudicated between the same parties, or the same point was put in issue on the record, and directly found by the verdict of the jury.

In an action of replevin for a piano, a former judgment between the same parties in an action of trespass *quare clausum*, in which taking away the same piano was alleged by way of aggravation, is not conclusive; as title to the piano was then only indirectly involved.

THIS was an action of replevin, to recover a piano-forte. The writ was dated January 15, 1849; returnable to the April term of the court of common pleas, 1849.

The defendant pleaded the general issue, and averred property in himself, but filed no other specification of defence.

The plaintiff, to prove title to the piano in himself, offered the record of an action of trespass *quare clausum*, brought by the present defendant, Thompson, against the present plaintiff, Gilbert, at the same term of the court as the present suit. In that action, the taking and carrying away of the same piano was alleged by way of aggravation of damages, and the verdict was in favor of Thompson, and damages assessed in the sum of forty dollars.

A witness testified that he was in court when the former action was tried; that he heard a part of the case and the arguments of counsel; that the question of title to the piano was argued by the counsel in the former suit, and commented on by the judge; and that, after verdict was rendered, the judge asked the foreman of the jury if they had considered the title to the piano, to which he replied that they had: the judge then asked if they found the title in Thompson or Gilbert, to which the foreman replied, in Gilbert.

The presiding judge, *Mellen*, J., ruled that the foregoing testimony was admissible and conclusive, and that the defendant was precluded from offering testimony as to the ownership of the piano, and ordered the jury to return a verdict for the

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plaintiff. This was done, and damages were assessed at one dollar. The defendant alleged exceptions.

E. G. Dudley, for the defendant.

G. Griggs, for the plaintiff.

BIGELOW, J. We think it very clear that the ruling of the court below in this case was erroneous.

The law is well settled, that a judgment in a former action is conclusive only when the same cause of action has been once adjudicated between the same parties, or the same point has been put in issue upon the record, and directly found by the verdict of the jury. *Eastman v. Cooper*, 15 Pick. 276, 279. To have this effect, the rule formerly was, that it must be pleaded in bar, or by way of estoppel, unless the party, relying upon it as a defence, had had no opportunity of so pleading it, in which case it was allowed to have the same effect, when offered in evidence. *Outram v. Morewood*, 3 East, 346; *Vooght v. Winch*, 2 Barn. & Ald. 662; 2 Smith's Lead. Cases, (Am. ed.) notes, 496; *Howard v. Mitchell*, 14 Mass. 241; *Eastman v. Cooper*, 15 Pick. 276.

If a matter to which an estoppel was applicable, was distinctly put in issue by one party, and the other party, instead of pleading the estoppel, took issue upon the fact, he was held to have waived the estoppel, and the jury were permitted to find the truth, although it might be contrary to the record. Under the system in force in this commonwealth, of trying all questions under the general issue, a party cannot, of course, be held to the same strictness. But it would certainly seem to be reasonable, and in accordance with the principle upon which the rule of pleading was originally founded, that any matter relied upon as an estoppel should be set out in the specification of defence; otherwise, it ought to have no other effect than as evidence, competent under the general issue, to be passed upon by the jury. In the case a bar, no such specification of defence was filed. But, without determining this question, it is sufficient for the decision of this case, that the fact relied on by the defendant as conclusive, was not essential to the finding of the former verdict, but was only incidental and collateral thereto. The former action

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was trespass *quare clausum*, the gist of which was the breaking and entering the house of the present defendant. The taking of personal property was alleged only by way of aggravation of the principal injury, and the title to it could only come in question incidentally, as affecting the amount of damages, and not as essential to the maintenance of the action. All that was essential to the finding of the verdict in the former action was proof of the breaking and entering. This was all that was directly in issue between the parties, and all that was conclusively settled by the verdict and judgment. Although, therefore, the title to the piano, as an element to enhance the damages, was actually drawn in question and passed upon by the jury in the former action, yet it was a question collateral to the one really in issue between the parties. The rule is well settled, that nothing can be pleaded by way of estoppel, or relied on as conclusive evidence against a party, except it was directly in issue and found by the former verdict. This rule cannot be extended to collateral facts, or facts to be deduced by inference from the former finding of the jury. It follows that, the cause of action in the former suit having been different from that now at issue between the parties, and as the title to the piano, although incidentally passed on by the jury, was not the gist of that action, but only incidentally involved therein, the former judgment cannot be held to be conclusive upon the plaintiff in this action. See *Dutton v. Woodman*, ante, 255; *Harding v. Hale*, 2 Gray, 399.

Exceptions sustained.

JOHN L. TUCKER vs. JAMES HAUGHTON.

By the last will of A., his brother B. was appointed his executor, and named as the legatee of the surplus of his property after the payment of his debts. Letters testamentary were granted to B. who gave bonds with his two partners only as sureties. B. loaned \$5,000 of his brother's estate to the firm of which he was a member, and the firm subsequently failed. B. was removed from his trust as

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executor, and C. was appointed in his place. C. having obtained various choses in action belonging to A.'s estate from B., under the authority of the probate court, compromised with and released B. as a debtor of the estate. The estate was subsequently represented insolvent, and commissioners were appointed to settle it. D., a creditor of the estate, whose debt remained unpaid, addressed a letter to B. respecting it; and B., in his reply, after setting forth in detail the condition of the estate said: "And now if I should have the ability, it will be the first act I shall perform, to place in their (the creditors') hands the amount which was lost by the firm of B. & Co., which would have paid to them not far from two thirds of their several claims." D. brought a suit against B. on this letter, alleging a promise by B. to pay D.'s claim against the estate, and it was held that the action could not be maintained.

THIS was an action of assumpsit to recover of the defendant a debt originally due from his brother, Richard Haughton. The validity of the claim against said Richard was not in dispute. The case was heard in the court of common pleas, before *Bigelow*, J., upon the following agreed statement of facts:—

Richard Haughton, of Boston, by his will, dated April 16, 1841, devised and bequeathed all his estate, real, personal, and mixed, to his brother, James Haughton, of Boston, the defendant, who was also named executor in the will. Richard Haughton died April 17, 1841. The will was admitted to probate May 17, 1841, and letters testamentary were granted to James Haughton, who, as principal, with his partners in business, George W. Heard and Theodore P. Hale, residents of Boston, and doing business under the firm of James Haughton & Company, as sureties, signed the probate bond.

The first account of the executor, containing a list of the debts owed by the estate of Richard Haughton, verified by the oath of the executor, among which was this debt of the plaintiff's, was allowed on the 26th day of September, 1842. In this account, the debts of the estate were put at \$20,806.76, and the assets, after deducting cash paid for funeral expenses, and the amount of a mortgage upon personal property which had been foreclosed, were stated at \$16,082.25.

Subsequently, James Haughton, as executor, loaned the sum of \$5,000, of the assets of Richard Haughton, to the firm of James Haughton & Company, and the same has never been repaid.

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On the 17th of October, 1842, on the petition of some of the creditors of Richard Haughton, among whom was the plaintiff, James Haughton was removed from his trust as executor, and on the 14th of November, 1843, E. G. Austin was appointed administrator *de bonis non* of the estate of Richard Haughton.

On the 9th day of March, 1843, James Haughton & Company (George W. Heard and Theodore P. Hale) filed their petition in insolvency, before Joseph Willard, Esq., a master in chancery, and, on the 28th of the same month, each of them received his discharge from his joint and separate debts.

On the 27th of November, 1843, the administrator *de bonis non* was allowed by the judge of probate to compromise the claim of Richard Haughton's estate upon James Haughton; and, on the 4th of December, 1843, in pursuance thereof, he gave to James Haughton a discharge and release. In his first account, allowed May 27, 1844, the administrator charged himself with \$12,453.32, received under the compromise from James Haughton. A list of debts, to the amount of \$16,094.59, was at the same time filed, the estate was represented insolvent, and William Minot and George S. Hillard, Esquires, were appointed commissioners of insolvency on the estate. No return has been made by the commissioners.

On the 10th of March, 1845, in answer to a letter of the plaintiff, of March 5, making some inquiries relative to the estate of Richard Haughton and its settlement, the defendant wrote, informing the plaintiff of the condition of the estate, and said:—

“ I have been thus particular to state the facts to you, for I deem it my duty to do so, and if mortification and chagrin would pay the unpaid portion of my brother's debts, they would have been paid three years since. And now, if I should have the ability, it will be the first act which I shall perform, to place in their hands the amount which was lost by the firm of James Haughton & Company, and which would have paid to them not far from two thirds of their several claims. To you particularly, whose kindness towards my brother was always so affectionately spoken of by him. I must be allowed

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to say, that I most deeply and sincerely regret that your claim remains unsettled."

For the purposes of the trial, the defendant admits that he is now of sufficient pecuniary ability to pay this claim of the plaintiff's and the amount belonging to Richard Haughton's estate, lost by the firm of James Haughton & Company.

If, upon the foregoing facts and pleadings, the plaintiff can maintain this action, he is to have judgment for such amount as the court shall find due from the defendant. If he cannot maintain this action, he is to become nonsuit.

Judgment having been ordered for the defendant, the plaintiff appealed to this court.

G. Lunt, for the plaintiff.

J. G. King, for the defendant.

SHAW, C. J. This was an action of assumpsit, to recover a balance of account, amounting, with interest, to about 400 dollars, claimed to be due to the keeper of the Tremont House from the defendant. It appeared that Mr. Richard Haughton was the original debtor of the plaintiff, and that he died in 1841, leaving a will, by which the defendant was appointed his executor, and named as the legatee of the surplus of his property, after payment of his debts.

It was supposed, at the time, that this surplus would be a large one. The will was proved, and letters testamentary were granted, at the probate office, to the defendant, who gave the required bonds, with his two partners only as sureties. There was, therefore, no security but that of the mercantile firm, of which the defendant was the principal member, and if the principal failed, it was likely that the firm would also fail. The sum of 5,000 dollars was subsequently lent by the defendant to the firm, and, in the spring of 1843, the firm failed, and were discharged under the insolvent law. In November, 1843, the defendant resigned his trust, and Mr. E. G. Austin was appointed in his place. He obtained from the defendant various choses in action, of the estimated value of about 12,000 dollars, and, under the authority of the probate court, upon the receipt of so much, compromised with and released Mr. Haughton, as the debtor of the estate. The

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estate was subsequently represented to be insolvent, commissioners were appointed to settle it, and they have as yet made no return.

The debt due to Mr. Tucker remaining unpaid, he addressed a letter to the defendant, requesting information with regard to it, and the defendant, in reply, wrote a letter, dated March 10, 1845, on which this action is brought. The letter expresses extreme regret at the circumstances which had prevented the payment of the account. It begins by stating that, soon after the death of the testator, the defendant had written to the plaintiff, expressing great confidence that any claim he might have would be immediately paid, and saying that he thought the bill due from his brother must be small, as he died on the day when he was about to sail for Europe, and the defendant had understood him to say, that his bills at the Tremont House were paid. The letter is very penitential in its tone, and states all the circumstances of the case very fully; and the defendant says he has been thus particular in stating the facts, from a sense of duty; that, if mortification and chagrin would pay the debts he owed to his brother's estate, they would long since have been paid, and that, if he had the ability to do so, it ought to be and would be his first act, to place in the hands of the executor the whole amount due from the firm of James Haughton & Co., in addition to what he had already paid over, which would make enough to pay not far from two thirds of the debts of the estate. He concludes by expressing his deep regret that a claim should remain unsettled which was due to the plaintiff, between whom and his deceased brother there had been so much mutual regard and affection.

In the agreed statement of facts, the defendant admits that he has sufficient pecuniary ability to pay the claim of the plaintiff, but not the like proportion of the whole amount lost by the firm of J. Haughton & Co. Upon these facts, the court are of opinion that the action cannot be maintained.

In the first place there is no promise to the plaintiff. No particular form of words is necessary to constitute a promise.

If the paper shows that the writer took upon himself the

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duty of paying, it amounts to a promise. In this letter, the defendant, expressing his deep regret at the loss of the creditors of the estate, through the failure of James Haughton & Co., and his mortification, &c., then adds the words relied on as a promise. "And now if I should have the ability, it will be the first act I shall perform, to place in their (the creditors') hands, the amount which was lost by the firm of James Haughton & Co., and which would have paid to them not far from two thirds of their several claims. 'To you,' &c., adding some words of special personal kindness, but no assurance or stipulation of any kind respecting his separate claim.

This is the only paper, which contains any contract, stipulation, or assurance of any kind, on the part of the defendant.

In the first place, here is no promise to pay money to the plaintiff. It is not that the words are not sufficient; when there is a good consideration, and one says to the other, it shall be my first act, on a certain contingency, to pay, it is a promise to pay. But here the extent of his undertaking is, to replace money to a certain amount in the hands of the creditors. The only construction is, not to pay any creditor any proportion of his particular debt, but to replace, in the hands of the administrator and personal representative, a sum equivalent to a loss the estate had sustained. The proportion which it would be of the whole claims was a mere estimate.

Again, it is urged that the defendant says, that such payment on his part would pay two thirds of the deficit. These are merely words of assurance.

2. But besides the above consideration, showing that the paper proves no promise to the plaintiff, there is another quite as strong; there is no consideration moving from the plaintiff to the defendant.

So far as his liability as executor forms the consideration for a promise, it had been absolutely released by the authority of the probate court. The plaintiff had done nothing, and said nothing, which could be a consideration. There are several other considerations applicable to the case, but those already mentioned are decisive. According to the agreement in the case, the

Plaintiff must be nonsuit.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE MECHANICS BANK *vs.* DEXTER HILDRETH.

Two partners, subsequent to the filing of a petition by one of them, individually, for the benefit of the insolvent law, but prior to the first publication of notice, divided between themselves certain promissory notes, the property of the partnership, one of which, before such publication, was indorsed with the partnership name by the partner receiving it; and such indorsement was held to pass a valid title in the note, so as to enable a subsequent indorsee to maintain an action against the maker.

THIS was an action of assumpsit, brought to recover the amount of a promissory note, bearing date August 31, 1849, signed by the defendant, for the sum of \$500, payable in nine months from date, to Hall & Lane, or order, and indorsed by them and A. B. Hall, to George W. Chipman.

At the trial in the court of common pleas, the plaintiffs proved the handwriting of the several indorsers on the note. It was in evidence that Jeremiah S. Hall and Edwin J. Lane, of Lowell, dry goods dealers and copartners, under the firm of Hall & Lane, sold, on the 31st of August, 1849, all their stock of goods to the defendant, who is of Lowell, a grocer, and took therefor six notes, including the note in suit, five for \$500 each, and one for \$509.70. Thereupon the notes were deposited in the hands of A. W. Farr, the attorney who transacted the business, to be held by him until it should be ascertained whether the creditors of Hall and Lane would undertake to invalidate the sale, and take the stock of goods out of the defendant's hands. Afterwards, the defendant transferred and delivered the stock of goods to Daniel West, of Lowell, and West gave the defendant a bond, to indemnify him against the notes. After receiving the bond, and upon the fourth day of October, 1849, the defendant told Farr, who held the notes, that he might deliver them to Hall & Lane, and that they and West might settle the matter together. Accordingly, Farr, in the evening of the 4th of October, 1849, gave four of the notes to Hall & Lane, who immediately divided them between themselves, each taking

two as his share and property. Hall received the note in suit as one of his; and there was evidence that Hall & Lane, immediately on going out of Farr's office, gave to each other authority to use the firm's name in transferring the notes. Of the other two notes, one was, by the consent of all the parties thereto, given up to West, and the other had been reduced by indorsements, and afterwards, by consent of all the parties thereto, on the 4th day of October, 1849, transferred.

The day before this division, to wit, on the 3d of October, 1849, Edwin J. Lane, filed his petition for the benefit of the insolvent law, and the warrant thereon against his joint and separate estate was duly issued and put into the hands of the messenger, on the 4th day of October, and the messenger, just after the division of the notes as above mentioned, demanded them of both Hall and Lane. The first publication of the notice of Lane's insolvency was in the afternoon of October 6; and such further proceedings were had in insolvency, that the joint and separate property was assigned to W. P. Webster, assignee.

There was evidence that, on the 5th or 6th day of October, but before the first publication of the notice of Lane's insolvency, Jeremiah S. Hall went to Boston, and indorsed the note in suit with the name of Hall & Lane, and endeavored to sell it in State street, but without success; and, on the same day, and before such first publication, he made an agreement for the sale of it to A. B. Hall, which was afterwards, on the 12th day of the same October, carried into effect, and the money paid for it, and the note delivered to A. B. Hall, who afterwards sold the note to Chipman, who got it discounted by the plaintiffs. There was conflicting evidence as to the time when Jeremiah S. Hall indorsed the name of Hall & Lane on the note in suit. The plaintiffs received it from Chipman, and discounted it in the regular course of business, and were the *bonâ fide* innocent holders of it.

The note in suit was indorsed with the name of Hall & Lane in blank; and the plaintiffs, at the trial, before putting the note in evidence, asked leave to write over the name of Hall & Lane the words, "without recourse," which the presid

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ing judge, *Mellen*, J., as all the indorsers consented, allowed to be done. To this allowance the defendant excepted.

The defendant requested the judge to instruct the jury that the partnership of Hall & Lane was dissolved by the proceedings in insolvency; and that, on the 6th day of October, the property in the note in suit was so changed that, after that day, Hall could not negotiate the note in the name of the firm; and that, although the name of the firm was written on the back of the note by J. S. Hall, on the 5th day of October, yet if it was negotiated in the name of the firm before the 12th of October, it could not be negotiated by him alone.

The judge instructed the jury that, if they were satisfied, on the evidence, that the plaintiffs took the note before it became due, for a valuable consideration, in the usual course of business, and without notice, they would not be affected by any transactions between the antecedent parties; that the copartnership of Hall & Lane was dissolved from and after the first publication of the notice of Lane's insolvency; and that, after that date, Hall could not indorse the note in the name of the firm; and such indorsement, if so made, would be void, and, as the plaintiffs must derive their title through it, they could not recover. But if the indorsement was in fact made before the first publication of the notice of Lane's insolvency, the plaintiffs might recover, although the note was put in circulation after the publication; that the authority to indorse the note, whether implied by the division of the property between Hall and Lane, or given expressly by one to the other, was revoked by the dissolution of the partnership.

The jury having returned a verdict for the plaintiffs, the defendant excepted to the above rulings.

H. F. Durant, for the defendant, cited *Blakely v. Grant*, 6 Mass. 386; *Dana v. Underwood*, 19 Pick. 99; *Peaslee v. Robbins*, 3 Met. 164; *St.* 1838, c. 163, § 21; *Arnold v. Brown*, 24 Pick. 89; 3 Kent's Com. 58.

B. F. Brooks, for the plaintiff, cited *Clarke v. Minot*, 4 Met. 346; *Briggs v. Parkman*, 2 Met. 258; *Yale v. Eames*, 1 Met. 486; *Sweetser v. French*, 2 Cush. 309; *Wheeler v. Guild*, 20 Pick. 545.

BIGELOW, J. The single question upon which this case turned at the trial was, whether the plaintiffs had shown a valid title to the note in suit. They claimed to recover as indorsees, by a title derived through the indorsement of Hall & Lane, who, as copartners under that name, were payees of the note. The main ground of defence was, that the indorsement of the name of the firm was put upon the note after the dissolution of the copartnership, caused by an application of one of the firm, individually and not as copartner, for the benefit of the insolvent laws, and by the publication of the messenger's notice of the commencement of such insolvent proceedings; and that, therefore, no title to the note was passed by such indorsement, upon the familiar and well-settled rule of law, that, after the dissolution of a copartnership, in the absence of any special authority, one partner cannot indorse negotiable paper in the name of the firm.

We consider it unnecessary to go into a consideration of the question, which was very fully and ably discussed at the argument, whether a note, on which the name of the firm was indorsed before dissolution, but which was actually negotiated and put into circulation after the dissolution, by one of the copartners, without the authority of the other, passes by a good title to the indorsee; because, upon the facts stated in the bill of exceptions and found by the jury, we are of the opinion that a perfect title to the note was vested in one of the copartners, individually, before the dissolution, and before he negotiated it to the plaintiffs. It appears that the copartners, payees of the note, a month prior to the fourth day of October, 1849, had sold to the defendant their stock in trade, for which they took in payment six promissory notes. Four of these notes, by an agreement between the two copartners, subsequently made, were divided between them, each copartner taking two as his individual property. Hall, one of the copartners, received the note in suit, under this arrangement, as his own property. These facts seem not to have been in dispute between the parties at the trial. The question as to the time when the indorsement of the name of the firm was made on this note, was contested at the trial, and the jury

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have found that it was, in fact, indorsed before the publication of the messenger of the notice of the insolvency of the other copartner, and, consequently, before the dissolution of the copartnership thereby.

We have, then, this state of facts, admitted or found by the jury. Two copartners, during the continuance of the copartnership, agree to divide, and do actually divide, the joint property of the firm between themselves, each taking his share as his own individual property. This they had the legal right and power to do. Collyer on Part. § 174. Having the right to make such division of the copartnership effects, and having exercised it by dividing the notes among themselves, it follows, as a necessary consequence, that, while the copartnership continued, each copartner was fully empowered to do all that was necessary, in the name of the firm, to carry the division into effect, and to vest the title to the partnership property in themselves individually. While the copartnership continued, there could be no doubt of the power of one copartner to indorse a note in the name of the firm to a third person; and when it is agreed between the copartners to make it the separate property of one of the firm, he has the same authority, prior to the dissolution, to indorse it in the name of the firm, for the purpose of vesting a valid title thereto in himself.

The jury having found, that the indorsement on the note in suit was made before the dissolution of the firm, caused by Lane's individual application for the benefit of the insolvent laws, and it being admitted that such indorsement was made in pursuance of a valid agreement between the copartners, for a division of the four notes taken by them in payment for their stock in trade, it follows that thereby a good title to the note in suit was vested in Hall, so that he had a right to transfer it to the plaintiffs, who now hold it by a valid title derived through him. It is not, therefore, the case of a note put in circulation for the first time, upon its transfer by Hall to his indorsee, but that of a note first passed by a firm to one of its members, as indorsee for value, and by him negotiated in the regular course of business.

Exceptions overruled.

JOHN LONG vs. GUY LAMKIN.

A witness who is called to discredit another witness, and defeat the effect of his testimony, may be asked whether he has had a quarrel with such other witness.

In an action of trespass against a deputy sheriff, to recover the value of the stock and produce of a farm which had been seized and sold by him under an execution against A., the occupant of the farm, the plaintiff alleging that the stock and produce belonged to him, and had never belonged to A., and the record title to the farm being in the plaintiff and derived from sources wholly distinct from A., evidence that A., about the time of the conveyance of the farm in question to the plaintiff, had made fraudulent conveyances of other property to other persons than the plaintiff, is inadmissible for the defendant; nor can the title of the plaintiff to the property in question be affected by acts and sayings of A., made in the absence and without the knowledge of the plaintiff.

A., a deputy sheriff, levied an execution against B., on certain live stock and produce on a farm occupied by B. C. forbade the sale, claiming that all the property belonged to him, and, at the sale, he bid in most of the stock, including a certain cow. A. gave C. a bill of sale of all the property purchased by him, including this cow, but refused to take pay for the cow, excepting her in the receipt at the foot of the bill, and reciting that the price of her was tendered him by C. In an action of trespass brought by C. against A., to recover the value of the property sold by the latter, A. specified in defence that, after the sale, the cow was returned by him to C., and accepted by C. in full of all damages, if any, he was entitled to; and, a verdict having been rendered for C. for the value of the property including the cow, it was held that he could have judgment on this verdict only on condition that he should remit expressly on the record the price of the cow, and take judgment only for the balance.

THIS was an action of trespass, brought to recover the value of a quantity of hay, wheat in the straw, oats in the straw, and some cattle and hogs, the stock and produce of a farm in Vermont, which were seized by the defendant, as deputy sheriff, on an execution against James Long, the father of the plaintiff, and sold to satisfy the same; and it was alleged by the defendant that all the property belonged to the father, both the farm and the produce.

At the trial in the court of common pleas, the evidence showed that the plaintiff had resided in Massachusetts since 1834, and that the father resided on the farm, the record title to which was in the plaintiff, for four years before the seizure of the property, and had been and was in the possession of the property, when the same was seized on execution.

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The deposition of Lucius Haskell was offered by the defendant, for the purpose, among other things, of contradicting James Long, whose deposition the plaintiff had introduced, by showing that James Long had, in confidence, made statements to Haskell which were at variance with the testimony given by James in his deposition; and, on cross-examination, the plaintiff asked Haskell whether he had not had a quarrel of any kind with James Long. This question was objected to by the defendant, but the presiding judge, *Mellen*, J., admitted as competent evidence the following, being a part of his answer to the question, to wit, "that he had had some difficulty with James Long."

The defendant offered to show that about the time of the conveyance of the farm upon which the produce sued for was raised, James Long had made fraudulent conveyances of other property to other persons than the plaintiff, for the purpose of showing what the intentions of the father, as to defrauding his creditors, were, but the judge rejected the evidence. The defendant offered evidence of various declarations of James Long, made after the conveyance of the property to the plaintiff, while he was in possession of the property sued for; such as that he, James Long, "owned all the property on the farm; that the plaintiff had no claim whatever on it;" the judge admitted the evidence for the purpose of contradicting James Long's testimony, already in the case, but ruled that the jury must not regard them as affirmative proof of title in James.

Among the articles sued for was a cow, which, as it appeared by the plaintiff's evidence, had been purchased by him, and put on the farm and into the possession of the father. At the time of the seizure of the stock by the defendant, this cow, with some steers, some heifers, and some hogs, some of which the defendant contended, and the jury found did not belong to the plaintiff, and that one of them was the property of James Long, was taken and sold. At the time of the sale, fourteen days after the seizure, the plaintiff's agent in Vermont forbade the sale, and claimed all the property as belonging to the plaintiff, not separating or distinguishing this cow from the rest of the stock. At the sale, the plaintiff's agent

bid in most of the stock and among them this cow, for which he bid the sum of \$10.55, and drove them back and put them again on the farm. Four days afterwards, when the agent went to the defendant to pay him the amount of his bids, the defendant took the pay for the rest of the stock, and gave the agent a bill of sale of the whole, including this cow, which bill he receipted at the foot in these words:—

“Received payment of the above bill of John Long, by the hands of Isaac Cummings, except for the cow which was bid off by said Cummings, for said John Long, at \$10.55, and said Cummings tendered me the money for said cow December 18, 1846, for said Long.”

The defendant had specified in defence that, after the sale, the cow was returned by the defendant to the plaintiff, and accepted by him in full of all damages, if any, he was entitled to. The above was all the evidence in relation to any such return and acceptance.

The judge instructed the jury, that, in the absence of evidence of a release by the defendant to the plaintiff, of the amount of his bid for the cow, the measure of damages to which the plaintiff would be entitled, if any, would be the price at which the plaintiff bought the cow at the sale. The foregoing is all the evidence of a release of the defendant's claim on the plaintiff for the price bid for the cow.

It appeared that a part of the purchase-money of the farm was obtained by the plaintiff from the sale of a lot of land, the title to which stood in the plaintiff, but which the defendant contended was, in reality, the property of James Long, and had been fraudulently held by the plaintiff, merely for the purpose of keeping the same from his father's creditors. This lot was known as the Wheeler farm, and was situated in Guildhall, Vermont. James Long owned it, and, in 1834, conveyed it to John Bothell, who then gave two notes, signed by himself jointly with the plaintiff, to a third person, for a debt of James Long. The plaintiff offered evidence that those notes were paid by him, and that the deed of the land was given to him in consideration of such payment.

The defendant introduced evidence that James Long paid

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the notes, and had the deed made to the plaintiff to put the land out of the reach of his creditors, and thereby defraud them. There being no evidence, that, at the time of such conveyance to the plaintiff, James was indebted to any amount, or that he had not other property; and there being no evidence that the debt of the creditor, at whose suit the property sued for was seized, was in existence at that time, the plaintiff objected that, by the law of Vermont, it was not competent for the defendant to impeach such conveyance as fraudulent as to creditors, without showing that it was made with a view to future credits to be obtained by James; and the judge so ruled, and further instructed the jury that, if they found that, after such conveyance, the farm was held by the plaintiff in trust for the benefit of the father, and continued to be so held as a trust recognized by the parties, until after James became involved in debt, that then any abandonment or release by James of his right or claim under the trust would be in fraud of his creditors, and, as to them, the price for which it was sold by the plaintiff, in 1844, might be considered as the property of James Long; and the land bought with such funds and held by the plaintiff, might be considered as held by him in fraud of James's creditors.

The jury returned a verdict for the plaintiff, and assessed his damages at the sum of \$60.55; and the defendant alleged exceptions.

H. F. Durant, for the defendant.

W. H. L. Smith, for the plaintiff.

FLETCHER, J. This is an action of trespass. The defendant, a deputy sheriff in Vermont, having an execution against one James Long, for the purpose of satisfying it, took the stock and produce of a farm in Vermont, on which James Long lived.

The plaintiff, who is a son of James Long, brings this suit to recover the value of the property thus taken, alleging that it belonged to him, and that he was also the owner of the farm upon which the stock and produce were taken, and upon which his father, the said James Long, lived. The defendant justified on the ground, that the property taken belonged to

said James Long, and was rightfully taken to satisfy the execution against him, and that he was the really rightful owner of the farm, though upon the paper title it stood in the name of said John Long.

The deposition of said James Long was used in behalf of the plaintiff.

The defendant called one Haskell, for the purpose of contradicting and impeaching the testimony of said James Long, by showing that he had made statements to said Haskell, at variance with the testimony of said James in his deposition. The plaintiff asked Haskell if he had not had a quarrel with said James Long; to this question the defendant objected, but the court admitted the evidence of said Haskell, "that he had had some difficulty with said James Long."

The admission of this answer forms the ground of the first exception on the part of the defendant, for the reason, as alleged, that it was immaterial whether or not Haskell had had a quarrel with James Long, the witness of the plaintiff.

But as Haskell was called to discredit James Long, and defeat the effect of his testimony, the inquiry of Haskell, whether or not he was testifying under the influence of hostile feelings toward said James Long, was not immaterial, but pertinent and proper. It had a bearing upon his credibility. A witness may well be supposed to be better inclined and more ready to impeach and discredit an enemy than a friend.

The defendant offered to show that, about the time of the conveyance of the farm upon which the produce sued for was raised, the said James Long had made fraudulent conveyances of other property, to other persons than the plaintiff, for the purpose of showing what the intentions of the father as to defrauding his creditors were, but the court rejected the evidence. This rejection is the ground of the next exception on the part of the defendant. The defendant also offered evidence of various declarations of James Long, made after the conveyance of the property to the plaintiff, while he was in possession of the property sued for, such as that, he, James, "owned all the property on said farm; that the plaintiff had no claim whatever to it." The court admitted the evidence

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for the purpose of contradicting James Long's testimony in the case, but ruled, that the jury must not regard them as affirmative proof of title in James Long. To this ruling the defendant excepted.

The present case does not come within the principles and authorities relied upon in support of the two preceding exceptions.

If John Long had claimed under a conveyance from James Long, alleged to have been fraudulent, then the acts and declarations of James Long, the grantor and one of the parties to the alleged fraudulent conveyance, being within the principles stated in the authorities referred to, might be admissible in evidence. But John Long, the plaintiff, sets up no conveyance from James Long, and claims no title whatever to the property derived from him. The plaintiff derives his title to the property in question from sources wholly distinct from, and independent of, James Long. James Long does not appear at all in the paper title under which the plaintiff claims the real estate, and the plaintiff denies that James ever had any title to the personal estate.

There is no principle upon which the acts and sayings of James Long, a stranger to the title, and acts and sayings in the absence and without the knowledge of John Long, can be admitted to affect the title of John Long, the plaintiff. The rulings of the court, as before stated, were, therefore, correct.

The next exception taken by the defendant is, that the court erred in instructing the jury, that a fraudulent sale of the farm, to put it out of the reach of his creditors, could not be impeached except by a then creditor of James Long, and that the defendant, representing the rights of subsequent creditors, could not impeach it.

This exception does not appear to be supported in point of fact. No such instruction to the jury appears by the report to have been given. In truth, it is difficult to see how such instruction would have any application to the facts of the case. It does not appear that James Long ever made any conveyance to the plaintiff; that, at the time when the farm

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was conveyed to the plaintiff by another person, there was any *then* creditor of James Long, it not appearing that he was at that time indebted to any person.

The instructions to the jury do not conflict with the doctrine, that a conveyance, fraudulent at the time of making it, might be avoided in favor of subsequent creditors, which is the doctrine supported by the authorities to which the defendant refers.

The instructions, as actually given, appear to be sufficiently favorable to the defendant, and no exception is taken to them.

It appeared by the evidence that a part of the property taken and sold by the defendant, and for which this suit was instituted, was one cow. All the property was bought by the plaintiff, by his agent, and put back on the farm, including this cow. Payment for the property thus bought in was not made at the time of the sale, though it was all delivered to the plaintiff's agent, including the cow, and was ever afterwards held by the plaintiff.

When the agent of the plaintiff went to the defendant, to pay for the property, the defendant took the pay for the stock, except the cow, and gave the agent a bill of sale of the stock, including the cow, which he receipted at the foot in these words : " Received payment of the above bill of John Long, by the hands of Isaac Cummings, except for the cow which was bid off by said Cummings for said Long, at \$10.55, and said Cummings tendered me the money for said cow, December 18, 1846, for said Long."

The officer had become satisfied that this cow belonged to the plaintiff, and therefore refused to take pay for her, but returned her without pay.

The plaintiff claimed to recover, in this suit, for the cow as well as for the other property. The defendant specified in defence that, after the sale, the cow was returned by the defendant to the plaintiff, and accepted by him in full of all damages, if he was entitled to any.

The court instructed the jury that, in the absence of evidence of a release, by the defendant to the plaintiff, of the amount of his bill for the cow, the measure of damages to

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which the plaintiff would be entitled, if any, would be the price at which the plaintiff bought said cow at said sale. To this instruction the defendant excepts.

A verdict was returned for the plaintiff, including, of course, the value of the cow. Thus the plaintiff has got his cow, and also a verdict for the value of her.

In this line of operation, the whole process will be, the plaintiff, while he has the cow in his possession, will take from the defendant, as a trespasser, the value of the cow, and then the plaintiff, as a purchaser, will pay back to the defendant, as the vendor of the cow, the same money.

The instruction, that the jury might give the plaintiff the value of his cow, notwithstanding he actually had her again, was for the reason that the defendant had not given to the plaintiff a release for the amount of his bid for her; but the defendant had in fact returned the cow, and had put in writing that he refused to receive the sum bid for her, when tendered to him, and thus expressly waived his claim to it in writing, and had put in his specification of defence that, after the sale, the cow was returned by the defendant to the plaintiff, and accepted by him in full of all damages.

What occurred between the parties before the institution of this suit, was a sufficient acquittance, by the defendant to the plaintiff, of all claim to the purchase-money, so that the plaintiff, having the cow returned, and received, and kept by him, would have no right of action for the value of the cow. The plaintiff, therefore, can have judgment on his verdict, only on condition that he remits expressly on the record the price of the cow, and takes judgment only for the balance.

Judgment accordingly.

Vermont and Massachusetts Railroad Co. v. Fitchburg Railroad Co.

THE VERMONT AND MASSACHUSETTS RAILROAD COMPANY *vs*
THE FITCHBURG RAILROAD COMPANY.

The St. 1845, c. 191, which provides for the appointment of commissioners to fix the compensation which shall be paid by one railroad corporation for the drawing of its passengers, merchandise and cars over the railroad of another company, does not infringe upon any rights which the latter company may have under its charter to regulate tolls on its own road; neither is it a valid objection to the appointment of such commissioners, in any instance, that the parties agree as to the compensation to be paid for the carriage of passengers, and the petition asks for a commission merely to fix the rate for freight.

THIS was a petition to this court, under St. 1845, c. 191, for the appointment of commissioners to fix the compensation to be paid by the petitioners to the respondents, for drawing the merchandise and merchandise cars of the former over the road of the latter. A hearing was had before *Fletcher, J.*, whose report is as follows:—

This is a petition by the Vermont and Massachusetts railroad company, under a statute passed March 25, 1845, for the appointment of commissioners to fix a reasonable compensation to be paid by the petitioners to the respondents, for drawing the merchandise and merchandise cars of the petitioners over the railroad of the respondents; and the petitioners allege that the two companies are unable to agree upon the compensation to be paid to the Fitchburg railroad company, for drawing the merchandise and merchandise cars of the petitioners over the Fitchburg railroad.

In reply to this application, the respondents filed an answer, setting forth that the petitioners were, by their charter, authorized to make, and had made, a railroad from the western terminus of the Fitchburg railroad to the line of Vermont, through a section of country from which the respondents had previously drawn a large part of their business; and the petitioners were authorized, by such charter, to enter and use the Fitchburg railroad, and had used the same, the respondents drawing their cars, passengers and merchandise over the same, at reasonable times and for a reasonable compensation. And they further allege that, previous to the construction of

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the petitioners' railroad, they had, from their local traffic and business naturally flowing in from the route subsequently adopted by the petitioners, derived, for a series of years, an income of ten per cent per annum ; that, after the commencement of the railroad of the petitioners, and to accommodate the business thereof, they had enlarged their capital, extended their depot grounds, made new and spacious depots, and laid a second track, and agreed with the petitioners upon a very low charge for the transit of cars, passengers and merchandise, passing to or from the petitioners' railroad over that of the respondents ; that this tariff is still in force, and thereby much of the business of the respondents, heretofore local, is carried at these reduced rates, and claimed by such petitioners to be their business, and, under the effect of such reduction and outlay, the income of the respondents upon their capital has been reduced from ten to seven per cent per annum.

The respondents further allege that, by the fifth section of their charter, it was provided that the legislature might, after five years, reduce the rate of tolls and profits, which the respondents were authorized by their charter to fix at their discretion, but such tolls should not, without their consent, be so reduced as to produce less than ten per cent per annum.

And the respondents claim that this petition be dismissed, because it is not suggested therein that the tolls of the respondents produce more than ten per cent on the cost of their railroad, or that the respondents have demanded of the petitioners any rate of toll that would, if paid, cause their income to exceed ten per cent, or that the parties cannot agree on a compensation, after conceding to the respondents a right to their income of ten per cent, and inasmuch as the petition prays that such compensation be fixed without reference to such right.

The respondents further allege, that the parties have agreed upon a tariff of tolls to be charged on the passenger cars and merchandise of the petitioners, which has been acquiesced in by both parties, and deny that they are unable to agree thereon ; but admit that their committee has been requested, by a committee of the petitioners, to make a partial reduction on

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merchandise and merchandise cars, to which they did not accede, and urge that their agreed charge on passengers is extremely low, and deny that they have been asked to modify their whole tariff, but allege that they are willing to make any reasonable modification thereof. And they submit to the court that such tariff should be treated as a whole, and that it would be unreasonable and unjust to reduce their agreed charges on cars and merchandise, without elevating those on passengers; and that the acts authorizing commissioners to prescribe tolls over a railroad which another line is to enter, did not contemplate or authorize a partial application like that of the petitioners, or a partial hearing and adjudication thereon; and as the case provided for by law has not arisen, the respondents ask to have the petition dismissed.

The petitioners filed a replication, in which, among other things, they set forth that, by the fourth section of the respondents' charter, the legislature reserved the right to prescribe the rate of compensation to be paid the respondents by other companies authorized to enter and use their railroad. The petitioners further insisted that, inasmuch as the parties did not disagree as to the compensation to be paid for drawing the passengers of the petitioners, and, there being no suggestion in the petition or answer that the parties were unable to agree upon the compensation to be paid for drawing the passengers of the petitioners, that the case presented by the petitioners was within the provision of the statute referred to in the answer.

H. C. Hutchins, for the petitioners.

E. H. Derby, for the respondents.

DEWEY, J. This is a petition under the *St.* 1845, *c.* 191 for the appointment of commissioners to fix the compensation to be paid by the petitioners to the respondents, for drawing the merchandise and merchandise cars of the former over the road of the latter.

The leading objection taken to the granting this petition is that founded upon the supposed infringement of the charter of the respondents, if effect is given to the statute of 1845,

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c. 191. It is urged that the act creating the Fitchburg railroad company, (*St.* 1842, c. 84,) has secured to that corporation the full power of regulating their own tolls, subject only to the condition expressed in the charter, that the legislature may reduce and regulate them, in case their net income amounts to ten per cent on the capital stock.

But, in the opinion of the court, the section of the charter above referred to, and the statute under which this petition is sought to be maintained, relate to distinct subjects, and do not contain conflicting provisions. The charter itself (§ 4) enacts, that the legislature may authorize any company to enter with another railroad at any point upon the Fitchburg road, and use this railroad, paying therefor such a rate of toll or compensation as the legislature may, from time to time, prescribe.

The mode of using other railroads has been regulated by *St.* 1845, c. 191, and the mode of fixing the compensation to be paid therefor is also prescribed by this statute. We are of opinion that this statute provision was well authorized, and its exercise, so far as relates to the appointment of commissioners, does not depend upon the amount of percentage that the income of the road pays to its stockholders.

This matter of the income and expenditure of the respondents will, of course, form an important item in the consideration, by the commissioners, of the sum proper to be paid to the respondents for the use of their road and engines; but it does not affect the jurisdiction of this court, in the appointment of commissioners to fix the compensation to be paid by the petitioners, for the transportation of their cars.

It is then further objected to the present petition, that it only asks a partial or limited commission, one confined to finding the compensation to be paid for freight cars, and not embracing passenger cars.

The appointment of such commissioners is to be made by this court, when the respective parties are unable to agree. So far as they do agree, no further action is required; and if, as is said, the parties are both satisfied with their present arrangement, as to the sum to be paid for passengers and

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passenger cars, there is no occasion for further action on that point. But the inquiry ordered, will, of course, bring before the commissioners the entire relations of these parties, and the compensation to be paid for all the various services rendered by the respondents. The order to the commissioners should be a general order, as to all these matters; and this will leave the commissioners full supervision and authority in the premises, giving effect to the arrangements of the parties so far as they do in fact agree, and deciding between them as to all matters in dispute, as to compensation for transportation over their road for the petitioners.



THE CITY OF BOSTON *vs.* JOHN SIMMONS.

Under an agreement between a city and certain individuals, that, if the former will widen a street to a certain width, the latter will pay a portion of the expense thereof; the widening of the street, accordingly, but allowing the second story of a building on such street to project beyond and over the line of the lower story, the highway having in all other respects been made of the stipulated width, will not defeat the right of the city to recover of such individuals the amount of their subscriptions.

THIS was an action of assumpsit, brought on the 11th day of December, 1849, in which the plaintiffs sought to recover of the defendant the sum of five hundred dollars and interest, upon a certain writing, signed, among others, by the defendant, with the sum of five hundred dollars opposite his name, bearing date, "Boston, April 21, 1848," and is fully set forth in the opinion of the court.

The defence was, that the plaintiffs had not performed the condition in the writing precedent to their right to recover, in that they did not, within the year eighteen hundred and forty eight, cause Devonshire street, between Milk and Water streets, to be widened, by cutting off the estates on the easterly side thereof, and leaving that portion of Devonshire street 24 feet in width at its narrowest point. And the defendant offered to prove that the buildings standing at the

time of the trial, and which had not been cut off by the plaintiffs, and which were within the line of the street, as contemplated to be laid out of the width of twenty-four feet, were an inconvenience to the public, an obstruction to the passage through the street, and injurious to him as the owner of an estate on Milk street, opposite the end of Devonshire street.

But the presiding judge, *Bigelow, J.*, refused to admit the evidence, and ruled that the same was immaterial, and that the plaintiffs, upon the facts proved, if believed by the jury, were entitled to recover.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

B. F. Brooks, for the defendant.

P. W. Chandler, (city solicitor,) for the plaintiffs.

SHAW, C. J. This was an action of assumpsit, brought to recover the sum of five hundred dollars, being the amount set against the name of the defendant, upon the following agreement, subscribed by him, together with nine other proprietors of real estate in the vicinity of Milk and Water streets, in Boston:—"A proposition for widening Devonshire street, provided a portion of the expense thereof shall be contributed by private subscription, having been made to the undersigned, they hereby engage to pay into the treasury of the city of Boston, the sums opposite their respective names, within sixty days after the proposed improvement shall be completed. The conditions of this obligation are, that the city of Boston shall cause the said Devonshire street, between Milk and Water streets, to be widened, by cutting off all the estates on the easterly side thereof, and leaving that portion of said street twenty-four feet in width at its narrowest point."

It appeared at the trial, in the court of common pleas, that, in pursuance of votes of the board of mayor and aldermen of the city, and with authority derived therefrom and from deeds of the proprietors of the estates cut off, the street was duly widened as proposed; but the defence is, that the second story of a certain building, on the easterly side of Devonshire street was allowed to project, at one angle, a certain distance, —less than one foot,—beyond and over the line of the lower story of the same building.

It turned out, indeed, upon inspection of the proper records, that the city, by its regularly constituted authorities, the board of mayor and aldermen, did all that was required by law to be done, to make and complete a street, having all the characteristics and qualities of a public highway 24 feet wide, and so legally complied with the condition which would entitle the city to payment from the subscribers to this agreement.

But the complaint is, not that the street was not widened at its surface, but that a certain projection was suffered to exist, at some distance above the sidewalk, which amounted to a nuisance. Whether this slight projection of a few inches from an upper story was a nuisance or not, it did not prevent the street from being a highway 24 feet wide, with all the incidents and privileges of such a highway; any evidence, therefore, offered to prove it a nuisance, was irrelevant and rightly rejected. It is said that the mayor and aldermen are by law surveyors of highways in the city, and that it was their duty to abate the nuisance. That may be so, but still the city, as a corporation, has done all which it was required to do by the agreement in question. It has acquired not only the use, or perpetual easement, which the public has in land, taken for a highway, but, in the first case, it has a title in fee by a deed of conveyance to the city, of all the land necessary to a street 24 feet wide. It has the right to keep the way open *usque ad cælum*. But if the surveyors of highways have seen fit to allow any special and temporary accommodation to any proprietor of a building on the street, that does not defeat the rights of the city. It is like their allowing the eaves of a building to project, or the door-steps of a dwelling, or other like fixture, beyond the line of the street, where no actual inconvenience to the public arises therefrom. It is not essential to the widening of a street that all projections should be immediately removed from the buildings on its sides.

We think, therefore, that the city has performed the stipulations on its part to be performed, according to its agreement, and is entitled to recover of the defendant.

The exceptions are overruled, and judgment will be entered for the plaintiff on the verdict.

Exceptions overruled.

Allcott v. Boston Steam Flour Mill Company.

WILLIAM W. ALLCOTT vs. THE BOSTON STEAM FLOUR
MILL COMPANY.

A. agreed to serve a flour company as the superintendent of their mill, for a fixed annual salary, "and five per cent on the net profits, after deducting the expenses of the company, and six per cent on the capital stock." It was further agreed between the parties, that "the percentage on the profits of the company shall be made up and paid accordingly once in each year, to commence when the books of the treasurer shall be made up to show the annual state of the company." A. entered the service of the company in July, 1846, and the mill was not fully in operation till January, 1847. In March, 1847, at an annual meeting of the stockholders of the company, a statement, which had been made up by the president and one of the treasurer's clerks, was exhibited, showing the assets and liabilities of the company, a statement of what wheat and corn had been bought and ground, and what had been sold. A. having brought an action for his percentage on the profits of the company, as appearing by such statement, it was held, that he could not recover, inasmuch as such statement was a mere "estimate," and was not such a making up of the books of the company as was contemplated by the agreement; and that A.'s percentage was intended by the agreement to be calculated upon the profits of an entire year.

THIS was an action of covenant, alleging that the plaintiff agreed to serve the defendants, as "superintendent of their mill and storehouses," and the defendants covenanted to pay him, "as salary, the sum of twenty-five hundred dollars per annum, payable quarter yearly, and five per centum on the net profits of the company, after deducting the expenses of the company, and six per centum on the capital stock." The agreement contained the following clause:—

"That the percentage on the profits of the company shall be made up and paid accordingly once in each year, to commence when the books of the treasurer shall be made up to show the annual state of the company."

The case was referred to an assessor, who reported that there was due the plaintiff as *salary*, the sum of \$555.32.

As a second breach of covenant, the plaintiff specified, that the corporation had not paid him five per cent on the net profits of the business of the corporation.

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On this point the assessor reported "that the plaintiff entered the employment of the defendants, as superintendent of their mill and storehouses, in July, 1846, and continued therein until the early part of January, 1848, when he was dismissed; that the mill was in operation as early as October, 1846, though not in full operation till the 13th day of January, 1847; that, by the contract under which the plaintiff had entered the defendants' employment, he was, in addition to a salary of \$2,500 per annum, payable quarter yearly, to receive five per cent. on the net profits of the company, after deducting the expenses of the company, and six per cent. on the capital stock, and, in and by such contract, it was further stipulated that the percentage on the profits of the company should be made up and paid once in each year, to commence when the books of the treasurer should be made up to show the annual state of the company.

Richard Soule, a witness called by the plaintiff, testified as follows: I was a director of the Boston Steam Flour Mill Company, at the annual meeting in 1847. I was present at the annual meeting, or at some adjournment of it. Mr. Brigham was treasurer and agent at that time. I heard a statement by Mr. Brigham, at that meeting, in regard to the business of the company. There was a paper before the stockholders at the time. I can't say whether Mr. Brigham presented it as agent or treasurer. The stockholders relied on him. I heard the statement made by the treasurer at the annual meeting. I can't say whether it was at a directors' or stockholders' meeting; my impression is that it was a stockholders' meeting. I have no distinct recollection of details. The result was cheering and gratifying to stockholders. My impression is that there was a gain of \$15,000; I can't be exact. It was in the neighborhood of that; I can't say whether more or less. I think the paper contained the amount of purchases and sales, but no importance was attached to this; the result is what we looked for. I can't say the \$15,000 was before or after interest was deducted.

On cross-examination, the witness said: I can't say whether an interest account was stated. I did not investigate very

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critically. I don't know whether an interest account was brought in; have no recollection about it. There was a considerable amount of wheat and flour on hand, but I don't recollect the sum at which it was taken. The statement by Mr. Brigham I understood to be an estimate. I supposed it to be an estimate. I supposed it to be for the year ending with the annual meeting, but it was for less than a year — about six months. We commenced operations the preceding fall.

E. D. Brigham, called by the defendants, testified as follows: I was treasurer of the corporation in March, 1847. There was a memorandum made up by the president and my clerk, showing, first, the assets, then a statement of what wheat and corn had been bought and ground, and what had been sold. I now produce it. It is paper E. Paper F is in the handwriting of Mr. Allcott, and paper E is made up from paper F. This was not an annual statement. I made no report to the stockholders. The paper was made up by the president and my clerk, to show how the corporation stood. I think they ground a little in October, 1846, and, as soon as we got to work, the stockholders were invited over. I think this was in November. We were in full operation January 13, 1847. I made up an annual statement in March, 1848. By the books, the debit of profit and loss was \$18,372.67, on the 29th of February, 1848, as per statement made up for the annual meeting in March, 1848. To show this result, interest was not made up, nor was it in the statement of the operations of the company, in March, 1847, though a round sum was put down for interest in the assets.

On cross-examination, the witness testified: The profit and loss account was made up to the end of April, 1847, and again in October, 1847. I have no recollection of any annual meeting between 1847 and 1848, and no recollection of exhibiting the account to stockholders. Paper E was produced, I think, by the president, and was read, or the substance of it. The president and my clerk made it up. I may have helped; I don't recollect. The president had nothing to do with the financial concerns of the company, by which I mean that all

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the money passed through my hands. The receipts and payments were by me. There is nothing to show the condition at that time but papers E and F.

The annual meeting of the company was on the first Monday of March, 1847, when paper E was exhibited to the stockholders, and there was no other annual meeting of the company till March, 1848, the time provided by the by-laws. No evidence was offered of any other statement having been exhibited to the stockholders, till the meeting in March, 1848.

If, in the opinion of the court, under the contract between the parties, the plaintiff, at the annual meeting in the spring of 1847, was entitled to have the net profits ascertained, and to receive five per cent thereof, after deducting interest as above, and if the statement E is such a making up of profits on the evidence, I find that, in addition to the sum of \$555.32, above found as due to the plaintiff on account of salary, he is entitled, on account of profits, to the further sum of \$335.10, with interest to be added.

But if, in the opinion of the court, the plaintiff was not entitled to have the profits ascertained at the annual meeting in March, 1847, and the statement contained in paper E, and exhibited at the meeting of the company at that time, was not such a making up of the profits as was contemplated by the parties, then I find that there was nothing due to the plaintiff excepting the sum before stated, as the balance due for the claim for salary, namely, \$552.32."

G. H. Preston, (with whom was *H. H. Fuller*), for the plaintiff.

1. The plaintiff had a right to have the percentage on the profits made up and paid to him once in each year, during his contract for services. 2. As to the time, in each year, when this statement should be made, the corporation could decide; it was not a matter under the plaintiff's control. 3. If the defendants wholly neglected to furnish such a statement, yet the plaintiff had a right to get at the truth in the best way in his power, and to claim his share of the profits accordingly; and the neglect or refusal of the corporation to do their duty and furnish the proper evidence, could not de

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prive him of his rights under the contract. 4. The fact, that the statement furnished at the first annual meeting did not embrace the operations of a whole year, can make no difference; that was the fault of the corporation, and not within the control of the plaintiff. 5. No other statement was made, and no other annual meeting took place till long after the first year of his services under the contract had elapsed. 6. In order to obtain his share of the profits, the plaintiff avails himself of the best evidence in his power, and the best the nature of the case admits, being the admissions in writing of the defendants themselves; and there is no pretence that these admissions are not according to the truth, or that they do any wrong or injustice to them. 7. Unless upon such evidence the plaintiff may recover, the corporation had it in their power to render entirely nugatory the stipulations concerning a share of the profits to be paid to the plaintiff.

A. H. Fiske, for the defendants.

BIGELOW, J.* The only question in this case is, whether, on the evidence reported by the auditor, the plaintiff is entitled to recover under that clause of the contract with the defendants, which provides that the plaintiff shall receive, in addition to his salary, "five per cent on the net profits of the company, after deducting the expenses of the company and six per cent on the capital stock, to be made up and paid accordingly once in each year, when the books of the treasurer shall be made up to show the condition of the company."

We are of the opinion that the plaintiff fails to show a breach of this covenant. In the first place, it does not appear by the evidence, that the books were made up to show the condition of the company, in March, 1847, the time when the plaintiff alleges there were profits shown to have been made by the company, on which he is entitled to his percentage. By the phrase, "when the books shall be made up," we understand it is intended to mean, according to the signification of the expression in mercantile language, and in the science of book-keeping, that process by which all the accounts contained in the books are balanced and brought up, and the result of

* METCALF, J. did not sit in this case.

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each, thus ascertained, is carried into what is termed a trial balance, or balance sheet, exhibiting the precise condition of each account, and showing the actual state of the company, with the amount carried to profit and loss account. The language of the agreement, applied to the subject-matter, seems to us to require this interpretation. Before the plaintiff can recover, therefore, under this clause in the agreement, he is bound to show that the books of the treasurer were so made up in March, 1847; failing this, he cannot recover. Upon recurring to the testimony taken before the auditor, on this point, it will be found that it falls short of proving this essential fact. The evidence goes no further than to show, that "an estimate" of the state of the company was then made up, but that no accurate statement of the accounts of the company, showing its true condition, was prepared by the treasurer, or entered in the books.

But there is another and more decisive objection to the plaintiff's recovery for a breach of this covenant. By the true construction of the agreement, the profits, on which the computation of the plaintiff's percentage was to be made, were intended to embrace and be calculated upon the business of an entire year, and were not to be reckoned on the transactions of a fractional part of a year. The clear intent of the parties was, that the plaintiff should receive a compensation graduated in part on a basis indicating the permanent prosperity of the company, and not upon the uncertain and temporary profits accruing during a short period. As the company did not commence business till October, 1846, and in March, 1847, when the plaintiff claims that large profits had been realized, had been in full operation less than two months, and as it appears by the evidence, that the business of the entire first year resulted in a loss, the plaintiff fails to show any ground for recovering under this clause in the contract.

We are, therefore, of the opinion, that judgment must be entered for the lesser sum reported by the auditor as due to the plaintiff.

Judgment for the plaintiff accordingly.

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GEORGE E. BETTON vs. FREDERIC H. ALLEN & others.

Under the insolvent law of Massachusetts, a person whose claim against the insolvent estate has been formally allowed by the commissioner, but from which allowance an appeal has been taken and prosecuted according to law, is not a creditor, entitled to vote as a creditor, after such appeal has been taken and perfected, and before any judgment upon it has been rendered by the appellate court.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by —

SHAW, C. J. This is a summary proceeding in a case of insolvency, under the powers granted to this court by the general insolvent law, (*St.* 1838, *c.* 163, § 18,) to have jurisdiction, as a court of chancery, in all cases arising under the act, upon the bill, petition or other proper process, of any party aggrieved by any proceedings under the act. In the present case, an injunction was granted to stay proceedings, without notice, upon a representation that the exigency was urgent, to inquire into a course of proceeding alleged to be irregular and illegal; and, if found so, to correct and restrain it before another meeting of the creditors of the said insolvent, which was then notified, and was to be held very soon. Generally, we have regarded such temporary injunctions, granted without notice, as provisional only, and founded in necessity, to prevent irreparable injury, and to keep matters *in statu quo*, until notice can be given and the parties be heard. The form of such injunction usually is, to continue until dissolved by the court or some one of the judges thereof, and the understanding is, that the party against whom it is granted may be heard at very short notice, upon an application to dissolve it. In general, therefore, the question presents itself in nearly the same form, and is to be examined in the same mode, and upon the same evidence, as the original application for a temporary injunction would have been, if notice to show cause had been given, and the adverse party had attended to oppose it.

This proceeding was commenced by a petition to this court

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by George E. Betton, Esq., assignee of the estate and effects of Robert B. Macy, an insolvent debtor, praying for an injunction to go to Frederic H. Allen, Esq., commissioner of insolvency, William B. Mitchell and others, claiming to be creditors of the insolvent debtor, who have proved their debts. The prayer is placed upon grounds set forth in the petition, and substantially admitted or proved by the minutes of the clerk, and the files and documents in his custody. Upon the facts the case appears to be this.

A first meeting was duly called and held. Several creditors then proved their claims. The petitioner, Mr. Betton, was duly chosen assignee, by a majority in value of the creditors who had thus proved, and an assignment was made to him by the commissioner, and he entered upon the duties of his office, and proceeded in the execution of them. At the regular time, and in due course, a second meeting was called and held; and, at an adjournment of such second meeting, the respondents, Mitchell & Co., offered proof of their debt, which was allowed by the commissioner. The assignee appealed from the decision of the commissioner allowing such debt, pursuant to § 4 of the general insolvent law, which appeal, the debt being a large one, was taken to this court, "to have the said claim determined at law." Notice thereof was given, according to the statute, to the creditors, to the commissioner, and to the clerk, and was duly entered on the minutes. The appeal was duly entered at the proper time in this court, and is yet pending and undecided.

Subsequently, an application was made to the commissioner by creditors, in which said Mitchell & Co. joined, to call a special meeting of creditors, to consider and act upon a proposal to remove the assignee. This was founded on a provision in the 11th section of the act, which provides that it shall be in the power of the creditors, by such a vote as is provided in the 2d section for the choice of assignees, at any regular meeting, called by order of the judge for that purpose, &c., to remove all or any of the assignees; which was extended, by a subsequent provision of the same section, to a single assignee. Such a meeting was called, and, upon taking the vote of the

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creditors, said Mitchell & Co., though objected to, were permitted to vote as creditors; and, including their debt, a majority in value of the creditors voted to remove the assignee. It was left a little uncertain, at this hearing, whether the commissioner had actually passed an order pursuant to this vote, removing the assignee, when this petition was filed and the injunction notified to him, or whether he was about doing so. But this is, perhaps, immaterial.

In the above cited passage, giving power to remove an assignee, it is to be done by such a vote as is provided in the 2d section for the choice of assignees. In recurring to the 2d section, it appears that, at the first meeting, debts are to be proved and allowed, and the creditors shall then proceed to choose an assignee, &c., "the choice to be made by the greater part in value of the creditors, according to the debts then proved," with a proviso not material here.

The question, therefore is, whether a person whose debt has been formally allowed by the commissioner, but from which allowance an appeal has been taken and prosecuted according to law, is a creditor, entitled to vote as a creditor, after such appeal has been taken and perfected, and before any judgment of the appellate court given upon it.

This question is, we believe, a new one under the insolvent law, and is not without its difficulties. Upon the first choice of an assignee, those whose debts have been allowed by the commissioner will, of course, vote; for, until the choice or appointment of an assignee, the hearing on any claim is of necessity *ex parte*, and there can be no one, as a representative of the creditors, to object to the proof, or take an appeal from the allowance by the commissioner, and the case here presented cannot exist. Practically, it is probable, no great inconvenience will arise from this source. The very case of insolvency supposes the existence of actual debts more than the debtor can pay, and those presented at the first meeting probably would be the acknowledged and uncontested claims, while those of a more doubtful character, intended to be resisted, would be likely to be postponed, until the creditors interested in opposing them should be represented.

What is the effect of the appeal provided for in this case? On the part of the creditor, the appellee, it is contended that the allowance of his claim by the commissioner is *prima facie* evidence of its truth and correctness, and that it must so stand, for all purposes of regulating the action of creditors before him, until reversed and annulled by the appellate court. On the other hand, it is maintained by the assignee and the opposing creditors, that an appeal, as understood, and as the term is employed in our legislation and jurisprudence, vacates and annuls the order or decree appealed from; that such decree, when an appeal is allowed by law, and is actually taken, is regarded as a mere interlocutory order, which is wholly superseded by the appeal, and that the case stands open, in the appellate court, to the same course of proceeding as if it were originally in that court.

With some exceptions, the court are inclined to the latter view of the question; one of these exceptions is, when a judgment or decree is founded on matter of law, apparent on the face of the record, an appeal is given by Rev. Sts. c. 82, § 6. In such case, it is considered that matters of law only are open on the appeal, though even in this case the judgment of the court of common pleas is vacated, and a new judgment entered in the appellate court. But this modern legislation was, to some extent, a departure from the course of practice in Massachusetts, under which an appeal from a justice of the peace to the common pleas, and from the common pleas to the supreme court, was regarded as an entire abrogation of the judgment appealed from. So that unless some new judgment was afterwards entered, it was wholly void. Even an affirmation of the judgment below, on a complaint to the appellate court, was in the nature of a judgment by default.

As to the general character and effect of an appeal, both in courts of common law and of those following the course of the civil law, we would refer to 6 Dane's Abr. 442; *United States v. Wonson*, 1 Gall. 5; *Murdock, Appellant*, 7 Pick. 303; *Murdock v. Phillips Academy*, 12 Pick. 244.

But without discussing the question at large, respecting
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every species of appeal, it will be better to ascertain, if possible, what was intended by the legislature as the effect of an appeal in this case. Mr. Dane, who was thoroughly conversant with the ancient law and practice, considers this allowance of an appeal, in common law cases, as a branch of our judicial proceedings almost peculiar to this state; that it is of civil law origin, and that it removes the cause entirely, subjecting the fact and law to a revision and a re-trial.

One great object of allowing an appeal, affecting a large class of cases, was to give the parties in the appellate court a trial by jury, which, from the constitution of the court, they could not have in the court of the first instance. Such were the probate court, and the courts of civil and criminal jurisdiction held by justices of the peace, and others sitting without a jury; but upon appeals, a full trial of fact and law was had in the court appealed to.

But the case under the old law, more nearly analogous to the present, was that of claims upon the estate of a deceased insolvent, examined before commissioners appointed by the judge of probate. They proceeded without a jury, had authority to take the testimony of the parties, and in other respects deviated from the course of the common law. In order to secure to both parties the benefits of a full trial of fact and law, according to the laws governing the rights of debtor and creditor, a somewhat different mode was provided, but coming to the same result. If the claim of the creditor was disallowed, he had a right to bring his action at law at the next court; otherwise he was forever barred. If his claim was allowed, and the administrator was dissatisfied, he simply gave notice to that effect at the probate office, and the claim was stricken out of the list of claims allowed by the commissioner. Of course he was forever barred, unless he commenced an action at the next term of the court, and proceeded to get a judgment in due course of law, to be certified to the judge of probate, to be added to the list of claims allowed. From this view, it is manifest that, upon the dissent of either party, expressed in the manner required by law, the report of the commissioners became a perfect nullity, and was no longer available for any purpose.

This course was changed in form but not in substance, by Rev. Sts. c. 68, § 8. The object seems to have been to simplify the proceedings, and avoid the trouble and expense of bringing a new original action, and secure the same end by more direct means. It provides that any person whose claim shall be disallowed, or any executor who shall be dissatisfied with the allowance of any claim, may appeal, and the claim shall thereupon be determined at common law; and it shall be tried and determined in like manner as if an action had been commenced therefor by the supposed creditor, against the executor or administrator. Here it is manifest, that the adjudication of the commissioners is treated as an absolute nullity.

We have already suggested, that the case of claims against a living insolvent, and the mode of prosecuting them, are more analogous to those of a deceased insolvent than to any others. In both, there will ordinarily be a large class of claims, about which there will be little or no question, which may be fitly passed upon in a summary way by a commissioner or a judge, requiring them to be verified by the affidavit of the parties only; but there may be another class, depending upon complicated questions of fact and law, which must be tried and decided under all the guaranties given by the law to debtors and creditors. The insolvent law, passed in 1838, was passed soon after the revised statutes went into operation, and has, in this respect, adopted the same provisions, and to some extent borrowed the language, of the revised statutes. We think the object was to provide for both classes of claims, the contested and uncontested; and the law has directed a course of measures well adapted to both. For this end, it provides that the claim may be passed upon in the first instance, in a summary way, by the commissioner, deciding upon facts without jury, and upon affidavit only, without conformity to the rules of evidence; but it also places it in the power of either party, on complying with the required terms, to take the case out of the class of admitted, and place it in that of contested, claims, in order, as the statute declares, "to have the said claim determined at law." And it further

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declares, that the like proceedings shall be had upon the joining of any issue of fact or law, and also upon the nonsuit or default of either party, as in any action for the same cause, commenced and prosecuted in the usual manner, except that no execution shall issue. The judgment of the court appealed to shall be final, with a right to except in matters of law ; and a judgment, being certified to the judge, shall ascertain the amount, if any, due to the claimant, and the list of debts shall be altered, if necessary, to conform thereto. It appears to us, that such an appeal, taken under such circumstances and upon such views of the law and the rights of the parties, does supersede and annul the order allowing a claim, founded, it may be, upon slight and informal evidence, in its nature provisional and interlocutory, and not intended to stand if contested ; and, after such an appeal, the order must be considered as vacated to all purposes, until some judgment of the appellate court is certified to the commissioner. In case the assignee should desert his appeal, and not enter it, or, having entered, should fail to prosecute it, or not succeed in making a successful defence, in all these cases, we think the appellee must obtain a new judgment of the appellate court, founded on proceedings thereon, such as on complaint, default, or verdict, and have it certified to the commissioner, as the basis of his allowing the claim of the creditor, and that such judgment would not revive or give effect to the judgment appealed from.

We think the policy of the statute is this, that, wherever it gives rights and qualifications to creditors, it gives them to those who have proved their debts ; and such proof must be effectual proof, made in the manner provided by law, that is, before the commissioner, if he allows it, and both parties acquiesce, otherwise at the common law, before a court competent to try cases of debtor and creditor, according to established rules of law and evidence. The case of the choice of an assignee at the first meeting is hardly an exception, — 1st, because it is a matter of necessity, and 2d, because the allowance of the commissioner must be *prima facie* evidence, before an appeal, and there can be no appeal before the choice of an assignee.

So the provision for a dividend directs it to be made among such creditors as shall have proved their debts; § 12. This undoubtedly means proved definitively in the manner provided by law.

The argument from inconvenience is urged against this view, and it is said that the claim of a creditor may be appealed from, and it turns out, upon a trial, that he has a valid demand, yet has had no voice with the other creditors, in the conduct of the proceedings. But perhaps the inconvenience is as great the other way, that one having a large claim may, on his own oath, or an *ex parte* hearing, induce the commissioner to allow a claim, when it shall turn out, on a legal trial, that his claim was colorable and groundless, and yet he may have chosen an assignee, and given a direction to the proceedings contrary to the interests and wishes of real creditors. Such was the case cited, where one, not justly entitled to prove, had a large claim allowed, and by his own vote appointed the assignee. *Ex parte James Baker*, 8 Law Rep. 461. We are pressed with the objection, that this construction puts it in the power of an assignee, by appealing, to prevent those creditors from acting and voting, whom he may suppose to be unfavorable to his views. It is dangerous to argue against the existence of a power, from a possibility that it may be abused. Almost all powers given for useful purposes may be perverted to injurious ones. If the power is not sufficiently qualified and guarded, the remedy is with the legislature.

A clause in § 15 was somewhat relied on, that any creditor who has proved his debt may appear, vote, and act, at all meetings of creditors, by his attorney. This leaves the mode and fact of proof just as it stood, and simply gives power to one having a right of appearing personally, to appear by attorney.

The court are, therefore, of opinion, that Messrs. Mitchell & Co. have no right to vote and act as creditors; that doings of creditors, affected by the vote of Mitchell & Co., and proceedings founded upon it, be vacated, and the case, with this order, be remitted to the commissioner, to proceed in the set-

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tlement of the estate as if no such vote had passed, and that the injunction be dissolved.

G. E. Betton, for himself.

B. F. Hallett, for the respondents.

WALTER PHELPS & others vs. THOMAS BREWER & others.

In a suit against a partnership, if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction; even though, by the *lex loci*, a service on the partner resident within the jurisdiction, is sufficient to authorize a judgment against all the partners.

The entry, by an attorney, of his general appearance for the defendants, in an action against a partnership, must be construed to be an appearance for the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally and personally, so as to render a judgment against the partnership, in such action, binding on an individual partner in another jurisdiction, by whom such appearance was not authorized.

One partner has no implied power to enter an appearance in a suit, except for the partnership, and cannot, by such appearance, bind a partner, personally and individually, who is not within the jurisdiction, and has not been served with process.

If, by a decree in equity, certain debts are found to be due from the respondent to the petitioner, no action can be maintained against the respondent on the original causes of action, in consequence of any new promise which may be implied by such decree, unless it be brought within such time, subsequent to the date of the decree, as is prescribed by the statute of limitation applicable to such causes of action.

THIS was an action of debt, brought in this court, on two alleged judgments, purporting to have been rendered in the county court of the county of Hartford, in the State of Connecticut, in favor of the plaintiffs, against the defendant Brewer and one Elbridge G. Roberts, of the city and State of New York, and Charles L. Roberts of Simsbury in the State of Connecticut, at a term of the court holden on the fourth Tuesday of March, 1840. The writ also contained a

count upon a promissory note, given by the New England Carpet Company, dated December 25, 1837, payable in six months from date, also a count upon an account annexed; being the original causes of actions in the suits in Connecticut. The writ is dated April 22, 1847, and no service was made upon either of the defendants except Brewer, who pleads the general issue and the statute of limitations.

The case was submitted to the court on an agreed statement of facts.

In support of the counts upon the judgments, the plaintiffs introduced in evidence attested copies of the records thereof, and of the writs in such cases, certified in due form of attestation by the clerk of the county court of the county of Hartford, which is a court of record, having jurisdiction over causes of action like those declared on. These judgments purport to have been rendered against the defendants jointly, for the amount of the account and note described in the plaintiff's declaration in the present suit, and for interest and costs thereon.

By the original writs in the cases in which the above judgments were rendered, it appears that the defendant Brewer, Charles L. Roberts, and Elbridge G. Roberts, were declared against as partners, under the name and firm of The New England Carpet Company; but, by the return of the officer, it appears that service was made upon Charles L. Roberts only, and not upon the defendant Brewer, or Elbridge G. Roberts, neither of whom was ever an inhabitant of, or resident in the State of Connecticut. At the entry of these suits in the county court, an appearance was entered by Thomas C. Perkins, Esq., but whether such appearance was for one or all of the defendants therein, is in contest between the parties. Such appearance was never withdrawn or altered upon the record, and, with reference to the same, Mr. Perkins's deposition, dated March 20, 1849, is, so far as material, as follows:—

“I do know that two suits were brought by Phelps, Beach & Co., then of Hartford, against the New England Carpet Company, in the county court in the county of Hartford and State

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of Connecticut, in the year 1839, according to my best recollection of the time; and I did appear as attorney of record in said suits, in consequence of directions received from one of the defendants therein. I never had any communication in reference to my appearance in said suits, with any of the defendants therein, except Charles L. Roberts.

I have no recollection or belief that Mr. Thomas Brewer ever authorized me in any way, directly or indirectly, to enter an appearance for him in said suits, or ever ratified, in any way, such appearance; unless such authority or ratification may be inferred from his business connection with Mr. C. L. Roberts.

It is impossible for me to recollect the precise language used by Mr. C. L. Roberts, when he authorized me to appear in those suits. I have no recollection or belief that he used Mr. Brewer's name when he so authorized me, or that he in any way made any special reference to Mr. Brewer."

The plaintiffs contended that Perkins's appearance was entered for all the defendants, and that all the defendants are bound by the judgments in such suits, and that Perkins was duly authorized so to appear by Charles L. Roberts, and that Charles L. Roberts, as a member of the partnership and as the agent of his copartners, was competent and legally empowered so to authorize him; which is denied by the defendants. It was also claimed by Brewer that the partnership was dissolved before said suits were commenced, but this point was not decided in the final disposition of the case.

The property of the firm, real and personal, except such consignments of their manufactured goods as they may have made to other places, was situated in the county of Hartford, where the manufactory was established. On the 1st of August, 1837, the partnership mortgaged their real estate, buildings and fixtures to one Hugh R. Kendall, to secure him against debt and liabilities to the amount of \$58,979.21. On the 24th of February, 1838, the firm, by Charles L. Roberts, conveyed to Kendall a large amount of personal property, raw materials, manufactured articles, goods and chattels, and *choses in action*, in trust, to indemnify and pay

all their debts to Kendall and his liabilities for them, the surplus, if any, to be paid to The New England Carpet Company; and, on the same day, by an instrument in writing, transferred their interest in such surplus to the plaintiffs in this action, in mortgage, and as security for the note and book debt therein recited. On the 6th of September, 1838, The New England Carpet Company, "by C. L. Roberts, agent," conveyed to Kendall, in mortgage, the machinery and tools of their manufacturing establishment; the condition of the mortgage being that the company should, within one day, pay to Kendall all their debts and liabilities.

It was contended, on the part of the defendant Brewer, that by the above transfers and mortgages the company parted with the whole of their property, or substantially the whole; and that, before the commencement of the actions of these plaintiffs in the county court of Hartford county, the partnership was, in fact and legal construction, dissolved.

The plaintiffs further proposed to put in evidence the record of a suit in equity brought by Hugh R. Kendall against these plaintiffs and defendants, in the supreme court of Connecticut, September 10, 1838, to foreclose his mortgages. It is admitted that the supreme court of Connecticut is a court of record, and had jurisdiction of the suit, but the defendant Brewer denies the competency of the record. The date of the decree in such suit in equity is August 10, 1840, and it is thereby ordered and decreed that, unless the debts due to Kendall under his mortgages, together with interest and costs, shall be paid to him before a specified time, by either the defendants or plaintiffs in this suit, they shall be forever barred and foreclosed of all right, title and equity of redemption in and to the mortgaged real and personal estate.

If, upon the foregoing facts, irrespective of the question whether the partnership was dissolved at the date of the commencement of the plaintiffs' suits in the Hartford county court, the court shall be of opinion that the judgments in such county court did not bind this defendant Brewer, and that he is not liable to any action founded thereon, a verdict is to be entered for the defendant; or if the court, upon the evidence

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in relation to the dissolution of the firm, together with the other agreed facts, shall be of opinion that the defendant is not bound by those judgments, a verdict is to be entered for the defendants, otherwise the defendant is to be defaulted, unless the court, instead of determining this question as to the dissolution of the partnership, shall think fit to submit the same to a jury, then the case shall be sent to a jury. Provided, however, that if the court, in relation to the counts in the plaintiffs' declaration, founded upon the original causes of action, are of opinion that the same are not barred by the statute of limitations, the case is to be sent to a jury upon that point.

W. Sohier, for the plaintiffs.

J. P. Putnam, for the defendant Brewer.

FLETCHER, J. This is an action of debt, founded on two alleged judgments, purporting to have been rendered in the county court of the county of Hartford and State of Connecticut, in favor of the plaintiffs, against the defendant Brewer, and one Elbridge G. Roberts of the city and State of New York, and Charles L. Roberts, of Simsbury, in the said State of Connecticut. The writ also contains counts upon a note and an account, which were the original causes of action upon which said judgments were rendered. The case is submitted to the court on an agreed statement of facts.

The present suit proceeds against Brewer alone, and the defence is made by him alone, the process not having been served on the other persons named in the judgments. The judgments were rendered in March, 1840. By the original writs, in the cases in which said judgments were rendered, it appears that the defendant and Charles L. Roberts and Elbridge G. Roberts were declared against as partners, under the name and firm of the New England Carpet Company; but, by the return of the officer, it appears that service was made upon Charles L. Roberts only, and not upon the defendant nor the said Elbridge G. Roberts, who were neither of them ever inhabitants of, or residents in, said State of Connecticut. The defendant Brewer was an inhabitant and resident of Massachusetts, and E. G. Roberts was an inhabitant and

resident of the city of New York, and Charles L. Roberts was an inhabitant and resident of the State of Connecticut, and was the managing partner; and all the partners signed and published a notice, that he was the general agent of the firm.

The writs in the suits, in which the judgments were rendered, were served on Charles L. Roberts, but were not served on this defendant Brewer, nor on E. G. Roberts; but it is not necessary to refer to the latter, as this suit is against Brewer alone.

Upon the entry of the suits in the county court of Connecticut, the initials of Thomas C. Perkins, an attorney at law, were entered upon the writ and docket, to indicate that he appeared for the defendants, in the mode in which it was usual to enter the appearance of attorneys for parties. What is the legal effect of such an appearance upon the defendant Brewer, is one of the questions raised and discussed in the present case? The appearance of the attorney Perkins was thus entered, upon the application of Charles L. Roberts, who was an inhabitant of Connecticut, and had been duly served with process. Perkins testified that he had no communication with Brewer in regard to the suit, and had no authority from him to appear for him. The records of the cases, as extended, did not show any appearance.

It is maintained, on the part of the defendant Brewer, that these judgments cannot be enforced against him in this commonwealth, for the reason that the court rendering the judgments had no jurisdiction over him; because, as he says, he was not within their jurisdiction, was not served with process, did not appear, or authorize any one to appear for him, and, therefore, that these judgments have no force against him in this commonwealth. This presents the first and principal question in the present case.

For the plaintiffs it is insisted, in the first place, that the records of the judgments of the court in Connecticut are conclusive.

But it is a matter now too well settled to admit of discussion, that when a party is not within the jurisdiction of the

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court, and is not served with process, and does not voluntarily appear and answer to the suit, by himself or his attorney, the judgment cannot be enforced against him out of the local jurisdiction. This point has been fully and repeatedly decided by this court, and, since the institution of this suit, has been directly adjudged by the supreme court of the United States. *D'Arcy v. Ketchum*, 11 How. 165.

That case is in principle precisely like the present, and fully sustains the position taken in behalf of the defendants.

Next, it is said, for the plaintiffs, that the record of the appearance in the suits in Connecticut is conclusive to bind the defendant Brewer. As it appears by the records that Brewer was not served with process, he cannot, therefore, be bound by the judgments, unless he is bound by the appearance.

The records, as extended, do not show any appearance. But suppose it to be competent to prove, by the initials of the attorney entered on the writs and docket, and other testimony distinct from the records, that the attorney, Thomas C. Perkins, intended to enter a general appearance, still it would amount to nothing more than a general appearance for the partners, as partners, and for the purpose of defending the action against the partnership, and it would not be construed to be an appearance for the partners individually, severally and personally, or for any other purpose than to defend that suit against the partnership. An appearance might be entered to prevent any judgment against the partners, as partners, or to prevent any levy on partnership property, or on funds in the hands of trustees, or to defend against proceedings in the nature of proceedings *in rem* against partnership property, or for other similar purposes. That is, the appearance might be to protect rights and interests of the partnership, so far as involved in those suits, and so far as the court had jurisdiction over such rights and interests; but not to bind the persons or property of the individual partners, except so far as they were necessarily bound in those suits. There is nothing in the case to show any appearance for this defendant, so as to render the judgments binding upon him individually in this commonwealth.

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It is further insisted on, in behalf of the plaintiffs, that it appears by the statute of Connecticut, that the service on Roberts was sufficient by the *lex loci*, and that the courts of Massachusetts should uphold that jurisdiction, unless contrary to natural justice.

But the statute of Connecticut could not give its courts jurisdiction over persons not within its limits, and not subject to its laws. Property found in that State may be liable to be taken upon a judgment rendered upon such a service. So, in this commonwealth, an attachment of property found here, of a person not within this commonwealth, may be followed up by a judgment and execution, and the property taken in satisfaction. But, in such case, the property only can be made subject to the jurisdiction, so as to render the judgment binding as a proceeding *in rem*, but it would not be allowed to operate *in personam* in the courts of other States.

A statute of New York provides, that a judgment may be rendered against several joint debtors, when one only is brought into court on process. Yet it was decided by the supreme court of the United States, in the case of *D'Arcy v. Ketchum*, before referred to, that, where a judgment was given in New York against two partners, one of whom resided in Louisiana, and was never served with process, an action could not be maintained on that judgment, in Louisiana, against the partner residing in that State.

Where there are so many distinct jurisdictions, and so many individuals living in one State, having business or transactions in another or other States, it would be most dangerous to hold a man bound by a judgment in a suit, where no process had been served on him, and where he was not within the jurisdiction of the court.

Another ground taken by the counsel for the plaintiffs is, that if the appearance of Thomas C. Perkins, the attorney, was entered in pursuance of a request of C. L. Roberts, as a general appearance, that Roberts, either by force of his general power as a partner, or as the agent and managing partner, of which public notice was given, had authority to make an appearance generally for the defendants; and that so

it was an appearance for Brewer, one of the partners, so that the judgments bind him individually and severally, and that the present action, therefore, upon them may be maintained against him.

There is much discussion in the books, and some conflict of decisions, as to the power of one partner to enter an appearance for his copartners in suits at law, or to bind them by submission to arbitration, or to confess judgment for them. But it is not necessary to go into a consideration of the authorities on these subjects, or to endeavor to ascertain what, upon the whole, is the established doctrine in regard to these several points.

The merits of this case would not be at all affected by assuming that Charles L. Roberts had authority, either by virtue of his general authority, as partner, or by the authority conferred on him as the agent of the firm, to enter an appearance in the suits in Connecticut, to defend the rights and property of the partnership, so far as they were involved in those suits. It would not come at all within the scope and purpose of such authority, to enter an appearance for this defendant Brewer, for another and distinct purpose and object, so as to give the court a jurisdiction over him individually, which they otherwise would not have, and thus give their judgments a greater force and effect against this defendant personally, than they would have without such appearance. No such authority would be implied as necessary for the interests of the firm, and still less as necessary for the interests of the individual partners.

Supposing, therefore, that the appearance of Perkins was general, and supposing, also — a fact which is not shown by his testimony — that he intended to enter a general appearance, it is clear that he had no authority from Brewer, the defendant, personally, but acted by the request of Roberts alone; and, therefore, the appearance must be regarded as such an one as Roberts had power to make for the firm or partnership only, and to defend their partnership property and rights, and not to bind the individuals who were not within the jurisdiction, and had not been served with process

The court having come to the conclusion that, even during the continuance of the partnership, Roberts had no right to enter an appearance for Brewer individually, so as to give the court jurisdiction over him personally and individually, it is not necessary to determine whether or not the partnership was dissolved.

It was said, by the counsel for the plaintiffs, that, though the defendant was not served with process in the suits in Connecticut yet that he had, in some way, knowledge of the pendency of the suits, and was within the limits of that State at some time while the suits were pending. But these facts cannot affect the principles upon which the decision of this case depends.

The only remaining question is as to the plaintiffs' right to a judgment against the defendant on the original causes of action, on which the suits in Connecticut were founded.

To maintain the present suit on these causes of action, it must be assumed that Brewer, the present defendant, stands wholly unaffected by the judgments, and that these original causes of action are not merged in them, but remain good as against him.

But any suit on these original causes of action is very clearly barred by the statute of limitations. The causes of action accrued in 1837 or 1838. The plaintiffs were under no disability, and were not within the exception of persons beyond sea. The bar, therefore, took effect in six years from the time the causes of action accrued, which was more than six years before the commencement of this suit.

It was urged, in the argument for the plaintiffs, that the operation of the statute of limitations was prevented by the proceedings in the suit in equity. But the decree in that suit was in 1840, more than six years before this action was instituted. The court are unable to see how any new promise, on the part of the defendant Brewer, can be implied from any thing in the proceedings on the decree in equity; but, if such new promise could be so implied, any suit upon it was barred by the statute of limitation, before the present suit was commenced.

Judgment for the defendants.

JEROME KIDDER vs. CHARLES W. BROWNE.

Under St. 1851, c. 233, [since repealed,] a writ cannot be entered on motion, or by consent of parties, after the expiration of the two days prescribed by § 13 for such entry.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by —

SHAW, C. J. This is a motion for leave to enter a writ, which was made returnable "before our justices of our supreme judicial court, at our clerk's office in Boston," on the first Monday of March current. The plaintiff did not move to enter it on that or the succeeding day. The court commenced its session on the second day, the first Tuesday of March. The question is to be decided under the statute of 1851, c. 233. The provisions of the 13th section of that act are to be considered in close connection with those of the 9th section. The ninth section provides that "all original writs, writs of *scire facias*, and writs of execution, returnable into the supreme judicial court, or court of common pleas, in each county, whether said court be then in session or not, shall be made returnable on the following return days, namely: In the counties of Suffolk, Nantucket, Dukes County, and Hampden, on the first Monday of every month," &c. At the close of the section it is added, that "all such writs shall hereafter be made returnable on these days, instead of the return days now fixed by law," then follow the negative words, "which are no longer to be return days of such writs."

A certificate has been filed, signed by the attorneys on both sides, stating that the non-entry arose from mere inadvertence and mistake, and signifying their consent to the entry of the action.

Now the 13th section of the act is this:—

"On the return of a writ, if a declaration shall have been inserted therein, or filed pursuant to the eighth section, the action shall be entered on the docket, by the clerk, upon motion of the plaintiff, or his attorney, made on the return day, or the next day thereafter, and upon payment of the fees of

the clerk therefor. If no declaration shall have been filed, or inserted in the writ, the action shall not be entered, and upon a complaint, as now provided by law, the defendant shall have judgment for costs. Such complaint shall be entered within three days after the return day of the writ, whether the court shall then be in session or not, and not afterwards, and the court shall enter judgment thereon at the earliest convenient day thereafter."

The original draft of the section, as contemplated, not as reported, directed the clerk to enter the writs referred to, but that was afterwards altered, upon the ground that the plaintiff might not choose to prosecute his action, or it might have been settled by agreement of parties, and without notice to the clerk; and, in such case, an action might be at issue on the docket, where there was no controversy between the parties, and no one to pay the entry fees. And hence it was provided, by the act as it passed, that the plaintiff, or his attorney, should move for the entry of the action; and that it should only be entered upon payment of the fees of the clerk therefor.

We suppose that, in all cases where the action is not entered, the defendant is entitled to his costs, upon making his complaint. Such complaint is to be entered "within three days after the return day of the writ, and not afterwards," and the court is to enter judgment at the earliest convenient day thereafter, as soon as it sits if it may be then done.

The question here is, whether this writ is not *functus officio*, after the two days for entering it have passed, and the time for the defendant to file his complaint for costs has arrived; and we are of opinion that it was. The principal doubt we have felt is, whether the action could be allowed to be entered by consent. But the provisions of the statute are express and explicit. The plaintiff has two days to enter his action, and after the lapse of the second day, if the writ is not entered, the defendant may enter his complaint. Under the law as it formerly stood, the whole term being in contemplation of law but one day, the court could allow an action to be entered on any day of the term. Then, when the court had jurisdiction of the

subject-matter, and of the persons of the parties, almost anything could be done by consent. But even under the law as formerly, the action could not be entered on motion, after the close of the return term; in cases where it was allowed on petition, it was by authority given by statute. But, as the law now stands, the writ is not returnable at any term, but on a fixed day, and that day and the succeeding one are alone allowed to enter the action. Suppose no writ had been made, or that it was offered for entry four months after the return day. Where are the limits of its jurisdiction, if the court has it here, and how long does it last? The difficulty in granting leave to enter by consent is twofold; 1st, the writ is *functus officio*, and the court have thereby no jurisdiction of the person; and 2dly, unless they have jurisdiction of the person, the court cannot take notice of the appearance of an attorney, or require the production of his power, or inquire into his authority. The very well-considered case of *Bell v. Austin*, 13 Pick. 90, is applicable to the present in principle.

That case came before the court upon a writ of error, and the error assigned was, that the judgment was rendered upon a default of the defendant, when he had not been duly summoned to appear before the court. It appeared that the writ was made returnable, by mistake, on the first Tuesday of April. The law having provided that the term should commence on the fourth Tuesday after the first Tuesday in March, which, in that year, had five Tuesdays. The plaintiff, in the court of common pleas, had leave to amend his writ, stating the right day of the sitting of the court, and the defendant not appearing, a default was entered, upon which the judgment was rendered. The court held the judgment erroneous, because the defendant had not been summoned to appear at that time. A default of the defendant admits that the plaintiff's declaration is correct, and implies the defendant's consent that judgment may be entered; but it is founded solely on the assumption that he has notice to appear at that time and answer, in which case silence is evidence of consent. But here, the defendant not having been summoned, no such consent could be implied.

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If the amendment was allowable without consent of the defendant, it made the officer's return of service appear to certify a summons to the defendant to appear at a time to which he had not been summoned. The defendant had not, in fact, been summoned to appear on the day named in the writ as amended.

The writ here cannot be entered *nunc pro tunc*, for the reasons already given, that the case is not, and never has been, in court, for any judicial action.

Motion for leave to enter the action overruled

JOHN A. FRENCH vs. JOHN M. BARNARD.

A writ was made returnable to the court of common pleas, under St. 1851, c. 233, on the first Monday in February, and an order was passed, on the second day of the following March, in the court of common pleas, on the affidavit of the defendant, for its removal to this court; and it was held that "the next term" of this court at which, under St. 1840, c. 87, such action must be entered, was not the term which commenced on the same second day of March on which the order for removal was passed, but the next subsequent term.

THE facts of this case sufficiently appear in the opinion of the court, which was delivered by —

SHAW, C. J. This is an action, brought in the court of common pleas, to recover a large amount of money, considerably greater than the \$600 required to give jurisdiction to this court.

The writ was made returnable on the first Monday of February last. An answer was filed in due course, and various proceedings were had in the case in the court of common pleas. The case was then, upon the affidavit of the defendant, according to the provisions of the act of 1840, c. 87, removed to this court, but the order for such removal was not passed till the second day of March current. Now, by the provisions of that act, the application for removal is to be made at the first term of the court to which the writ is returnable, and the action is to be entered at the term of this court holden next after such removal.

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To change the jurisdiction of the court, it seems to be necessary, by implication, that the whole jurisdiction should be changed, and the papers wholly transferred from that court to this. Here the writ was returnable on the first Monday of February, which is the commencement of no term. It is simply the return day of the writ, and the statute of 1851, c. 233, provides that the days on which the terms commence shall no longer be considered return days. Then the provision of the statute of 1840 is, that the party shall enter it at the next term of this court. There has been no first term of the court of common pleas after the entry of this action.

It is a matter of delicacy to say how it should rightly be removed, and the court give no opinion upon this point. There are certain things expressly required to be done by the clerk, by the latter statute, but it does not make him a judge. He has no power, in a case of this description, except to remove the papers and file them in this court.

The question then is, whether the words "the next term" of this court import this March term or the next term, in November. There are no fractions of a day to be reckoned in this case. This term commenced on the first Tuesday, the second day, of March, and the order for the removal of the action was passed on the same day, by the court of common pleas. There is no case directly in point, as, indeed, under so recent a statute, there scarcely could be. But there are various analogies to be drawn from other cases. Where, for instance, the entry of an award was the first act which brought a case within the jurisdiction of the court, and by statute, the entry was to be made at the next term after the award was agreed upon, the court could not take cognizance of the award, if entered afterwards. Again, all crimes must be first inquired into by the court of common pleas. And where an indictment was there found, and was by law to be returned to the next term of this court, it appeared that the term of the court of common pleas commenced on Monday, and the term of the court on the succeeding Tuesday; and the indictment was found on Wednesday or Thursday. All parties were willing and desirous that the case should be en-

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tered at this court as speedily as possible ; and the transfer of the trial from Cambridge, in the neighborhood of which the offence was charged to have been committed, and where this court was then held, to Lowell, where the next term was to be held, would occasion great inconvenience to the parties and their witnesses. Yet the court decided that it had no jurisdiction, and could not take jurisdiction of the case at that term.

Where the case is within the jurisdiction and under the cognizance of the court, almost anything may be done by consent, but where there is no jurisdiction, there can be no consent.

The motion to enter the action at this term is therefore overruled, and it must stand for entry at the next term.

A. B. Ely, for the plaintiff.

C. P. Curtis, Jr. for the defendant.

ROBERT C. WINTHROP vs. WILLIAM MINOT & others.

A petition for partition of real estate, under Rev. Sts. c. 103, cannot be granted, where the petitioner is seised of one moiety in his own right, and together with the respondents, as joint trustees with himself, of the other moiety, in trust for a third party.

THE facts in this case sufficiently appear in the opinion of the court, which was delivered by —

SHAW, C. J. This is a petition for partition of real estate, of which the petitioner is seised of one moiety in his own right, and together with the respondents, as joint trustees with himself, of the other moiety, in trust for a third party. And the question is, whether the petition can be granted under such circumstances ; whether there is such a diversity of interest as is contemplated by the statute, which gives this court jurisdiction in cases of partition. It was asked at the hearing, if the probate court had refused to take jurisdiction in the matter, and the reply was, that the trust was not created by devise,

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but under a power of appointment in a marriage settlement, and that, therefore, it was not within the province of that court. We cannot say what legal remedy there may be in such a case, but, if all the owners petition, this court has no jurisdiction. If all desire the partition, they may make it by deed, and if any one be incapable of acting from any disability, some one may be appointed to act for him. The statute appears to provide only for cases between adverse parties. It says that the proceedings may be by petition or by writ; if by writ, it is clearly adverse. And certainly partition could not be made between these parties under the latter form of proceeding, for here one of the parties is on both sides. The statute contemplates cases where the party respondent may be supposed, at least, to be able to plead sole seisin.

We are all of opinion that partition cannot here be granted.

R. C. Winthrop, for himself.

W. Minot, Jr., for the respondents.

JOHN ESSON *vs.* SILAS P. TARBELL.

An instrument, in form an indenture, executed by one party only, if it contains the requisite clauses to pass the property described, will operate as a deed poll.

The record of a mortgage made and certified by a subordinate officer in the custom-house at Halifax, Nova Scotia, for the comptroller, is valid under *St. 8 & 9 Vict. c. 85, § 7.*

A., the owner of a vessel, resident in Nova Scotia, mortgaged her to B., also resident there, who had his mortgage duly recorded, under the laws of the province, at the custom-house, and a memorandum thereof indorsed on the register of the vessel, these acts, by the *lex loci*, making B. the owner of the vessel so far as was necessary to give him security for his debt; and it was held, that he had thus acquired the possession of the vessel sufficiently to enable him to maintain replevin against an attaching creditor here.

The action of replevin may be maintained, under the statutes of this commonwealth, for an unlawful detention, although the original taking was lawful.

THIS was an action of replevin, tried before *Perkins, J.*, in the court of common pleas, from which it came to this court by exceptions. It was brought to recover the British vessel "Inquisitive," which was attached in Boston, together with other property, by the defendant, a deputy sheriff, on a writ in favor of Copeland and others against James Edward Croucher, January 9, 1849. The replevin writ bore date February 8, 1849, and was served February 20, 1849.

The plaintiff offered in evidence a paper purporting to be a mortgage from Croucher to Esson, dated December 23, 1848; the certificate of registry of the vessel, with a memorandum of such mortgage indorsed thereon; a notice of the mortgage given to the defendant, January 13, 1849, signed by R. Lincoln & Company; and one dated January 27, 1849, signed by John Esson, by Sohier & Lowell, his attorneys.

The plaintiff offered evidence that, on the 23d of December, 1848, Edward F. Stewart, whose name appears as certifying to the certificate of registry and the recording and indorsement of the mortgage, was a clerk in the office of customs at Halifax; that, at that time, a Mr. Trull was commissioned as collector of that port, but had not arrived; that Stewart had been appointed provisionally, but had been deprived of his appointment, December 1, 1848. The plaintiff claimed

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that Stewart acted rightly, in executing the certificate affixed to the documents above mentioned, under and by virtue of the *St. 8 & 9 Vict. c. 85, § 7*, and *St. 8 & 9 Vict. c. 93, § 37*; and also offered evidence that Stewart was in fact acting as comptroller, at the time of such certificate of registry, recording and indorsement of the mortgage, and the statement of Stewart that he was fully authorized by the above statutes, and by the practice under them; but gave no other evidence of his authority except such statement.

The plaintiff, to show the amount due under his mortgage, at the time of his demand on the officer or attaching creditor, offered the statements and stipulations respecting the same contained in the mortgage, and also the answers of S. L. Shannon, attorney of Esson, to interrogatories, that a part of the consideration of the mortgage, was a liability of Esson for a debt due from Croucher to a third party.

The mortgage was never recorded here, and Croucher came here as master of the vessel. The plaintiff offered no other evidence, except on the question of damages.

The specification of defence raised the question of property and the right of possession.

The defendant contended that the plaintiff could not recover, because the mortgage was not completely executed, being in form an indenture, signed by only one party, and was not recorded according to the British statutes referred to, such statutes giving no authority for Stewart's acts; that, under *St. 8 & 9 Vict. c. 89, §§ 45, 46*, relied on by the plaintiff, the mortgage did not pass the title without delivery of possession, and, without delivery, it was to be presumed fraudulent by British law; that it would not pass title against the defendant, holding under a valid attachment against Croucher, in this State; that the plaintiff could not recover without proving a demand on Croucher, of the amount due on the mortgage, and without proving the amount due on the mortgage, at the time of the demand on the defendant; and that there was no sufficient evidence thereof to go to the jury, unless the plaintiff proved that he had paid such liabilities for Croucher; and that, under such circumstances, the mortgage.

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with the other evidence above referred to, was not sufficient evidence to go to the jury, of the debt due; that the plaintiff could not maintain this action, as possession was not delivered to Esson; that, from the mere fact that Croucher was in command, it was not to be presumed that he acted as agent of Esson, but he might hold as owner; and that, by the terms of the mortgage, the plaintiff was not entitled to such possession as would enable him to maintain this suit; and the defendant requested the judge so to rule.

But the judge, in order to facilitate the settlement of all the questions of law on which the case depended, and also of obtaining the opinion of the jury on the points to be submitted to them, made a formal ruling against the defendant on all the above points, except that the plaintiff was bound to prove the amount due on his mortgage; and instructed the jury that, on this evidence, if they believed the demand of January 27, 1849, referred to, contained a true statement of the amount then due from Croucher to the plaintiff under the mortgage, there was no legal impediment to a recovery by the plaintiff; and directed the jury to find a verdict for him, and assess the damages, and that it made no difference whether Esson or Croucher was in actual possession; but the judge, by consent of parties, requested the jury to find, also, whether Croucher had ever, at any time, delivered the actual possession to Esson, or had himself remained in possession up to the time of the taking and detention for which this action of replevin was brought.

The jury thereupon found for the plaintiff, and assessed damages at one cent. They stated, upon inquiry by the judge, without objection by either party, that they found that Croucher was in possession up to the time above mentioned. The defendant alleged exceptions to the above rulings.

C. M. Ellis, for the defendant.

W. Sohler, for the plaintiff.

SHAW, C. J. This is an action of replevin, brought by the plaintiff, an inhabitant of Nova Scotia, against the deputy sheriff, Mr. Tarbell, to regain possession of a British vessel called the "Inquisitive," which was attached by the defend-

ant, on a writ brought by Copeland & Co., against James Edward Croucher, the master and mortgagor of the vessel, January 9, 1849. The vessel was replevied February 20, 1849.

The plaintiff claimed the vessel, under a deed of mortgage alleged to have been made by Croucher to himself, at Halifax, N. S., December 23, 1848, to secure the payment of £900, Halifax currency; the deed of mortgage purported to be signed, sealed, and delivered in presence of witnesses, to be recorded in the custom-house at Halifax, and a memorandum thereof entered on the original register of said vessel, on the same 23d December, 1848. Croucher was the master of the vessel, and came here in her as master.

The plaintiff, as mortgagee, after the attachment of the vessel made by the defendant, gave him notice of his mortgage, and of the amount due thereon, and demanded the same of the defendant. No money was paid or tendered to the plaintiff, pursuant to this demand. This question of the amount due to the plaintiff, and the demand thereof, was left to the jury, who found for the plaintiff.

Several exceptions were taken on the trial to the admission of evidence, and to the instructions under which the cause was committed to the jury, by the judge before whom the cause was tried. The exceptions were allowed, and it now comes before the court on these exceptions.

1. The first is, that the mortgage appears to be in the form of an indenture, but is executed by the mortgagor alone. A deed containing all the requisites of a conveyance, duly executed and delivered, is valid to bind the grantor and pass the property, although in the form of an indenture, and not executed by the grantee. It operates as a good deed poll. It is understood to be the most common form of conveyance and mortgage of real, as well as personal estate, in many of the states of the Union.

2. An objection was taken to the mortgage under which the plaintiff claims, on the ground that it was not duly recorded, indorsed on the register, and otherwise authenticated by the comptroller of the customs, according to the British navigation and registry acts.

It was, in fact, recorded and certified by Edward F. Stewart, for the comptroller; and the evidence shows that, at the time of this registration, a comptroller of the customs for the port of Halifax had been appointed but was not then present, that said Stewart was chief clerk, and in the absence of the comptroller was the principal officer of the customs at the port of Halifax.

The mortgage being made in Nova Scotia, if good according to the laws of that place, must be considered as good here.

The law of Nova Scotia does require both that transfers of vessels, and also mortgages, shall be recorded, and the requisite certificates made by the collector and comptroller of the port, Stat. 8 & 9 Vict. c. 89, § 45; but a subsequent act, Stat. 8 & 9 Vict. c. 93, § 37, provides, that every act to be done by the collector and comptroller in any of her majesty's possessions abroad, may be done by the collector, and any such act, done by the collector, *or other principal officer* of the customs, shall be as valid and effectual.

So in an analogous case, 8 & 9 Vict. c. 85, § 85, providing for the general management, &c., certain oaths are to be taken before the collector or comptroller, or before the persons acting for them respectively.

It recognizes the power of substitution. The evidence is decisive, that at the time this mortgage was recorded at the custom-house at Halifax, Stewart was the principal officer of the customs at Halifax. This testimony is furnished by Mr. Stewart himself, and Mr. Shannon, a lawyer, who testifies that such substitution is conformable to uniform usage, and is sanctioned by law. We are therefore of opinion that there is no foundation for this objection.

3. The next objection is, that by this mortgage no property in the vessel vested in the plaintiff, so as to enable him to maintain *replevin* against the defendant.

A mortgage deed, if valid, vests the property and title, as between the owner and the mortgagee, in the latter; it is a defeasible title, upon the performance of a condition subsequent but still it vests the property in the mortgagee.

This mortgage appears to have been valid by the laws of Nova Scotia. The British registry acts, expressly recognize

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and regulate the right of mortgaging vessels. Stat. 8 & 9 Vict. c. 89, §§ 45-6.

It is to be noted in the record, and in the minute entered on the certificate, that the transfer is given as a security for a debt.

That the right of the mortgagor, to the possession and use of the vessel, shall not be superseded, and to exempt the mortgagee from liability, for the supplies and expenses of such vessel, the act cited further provides, that no such mortgagee shall be deemed owner, except so far as may be necessary for the purpose of rendering such vessel available by sale or otherwise, for the payment of the debt, &c.

Sect. 46 provides, that when such transfer as security, by way of mortgage, has been duly registered, the right of the mortgagee shall not be affected by the bankruptcy of the mortgagor, although such bankrupt may have had the possession, order, and disposition of such vessel, and been the reputed owner thereof.

This seems to be quite decisive. The right of mortgaging property results from ownership. It is a conditional conveyance. The statute does not confer this right, but recognizes and regulates it. The mortgagee shall not be deemed owner, except, &c. Now this exception is equal to an express enactment, that, so far as it is necessary to give security to the debt, he shall be deemed owner. So, when the mortgagor becomes bankrupt.

It is held in Massachusetts, as the rule at common law, that a mortgage transfers the property, and, as between mortgagor and mortgagee, vests the property in the mortgagee. To the extent of reclaiming the vessel, when attached by a creditor of the mortgagor, it is necessary to the security of the debt that the mortgagee be deemed owner of the vessel, and have a right to assert that claim as owner, against the officer and creditor thus attaching.

4. It is urged that replevin cannot be maintained, because the mortgagor had no possession nor right of possession.

The general rule certainly is, that the right of possession follows the right of property when not specially restrained by compact, as it is not in this mortgage.

It is true, that at common law, to make a valid sale, as against third parties, possession must accompany and follow the conveyance. But this only applies to absolute conveyances, when the retaining of possession, by the vendor, being contrary to the avowed object of the sale, is regarded as a badge of fraud. But this rule is not applicable to mortgages, where the possession of the mortgagor is perfectly consistent with all the apparent purposes of a conveyance for the security of a debt.

But the provision of the British statute in force in Nova Scotia, where this mortgage was made, already cited, implies, that the vessel is to remain in the possession of the mortgagor, and provides that this circumstance shall not impair or affect the right of the mortgagee.

In the present case the provisions of law appear to have been complied with, so that the mortgage was valid.

5. The next ground is, that although this mortgage was valid in Nova Scotia, by the English law, as between the parties, it would not be valid against the defendant. The reason relied on is, that possession of personal property is recognized by universal law, as one proof of title and evidence of property, and that this will not be controlled by statute, which cannot operate extra-territorially.

We think a satisfactory answer is, that whatever operates as proof of property by the law of the place where it is, and where it is acquired, is proof of property everywhere. It establishes a right, a personal right, recognized everywhere. Possession is proof of property, both within the territory where it is acquired and elsewhere, but it is *prima facie* proof of property only, subject to be controlled by rebutting proof.

Then proof which shows that, although, when the vessel left the bounds of Nova Scotia, the master and former owner had the possession of her, yet, that by a transfer binding on him, and made conformably to the laws of the place where the property was when the transaction took place, and where the parties lived, by means of which the mortgagee had acquired a superior title, rebuts and controls the *prima facie* proof resulting from possession. This is not giving the stat-

ute an extra-territorial-operation ; it operated within the territory to transfer the title, so that when the vessel left the territory, the plaintiff had a valid qualified title as mortgagee.

Besides, the question here affects remedies. The defendant is a mere nominal party, an officer acting in behalf of the attaching creditor, who is contesting the right of the plaintiff as mortgagee. The attaching creditor claims a *lien* by force of his attachment, and the law authorizing it ; the plaintiff claims a *lien* by contract, by a mortgage, valid in the place where made, and binding on the vessel, coming here subject to it. Both depend on the *lex fori*, the law of Massachusetts. Both being equally recognized as valid *liens*, the prior in time has the preference in right.

It is further insisted, that the plaintiff could not go on in this action of replevin, because there was no proof of his debt, and because he had no right of possession.

We understand that the question as to the existence and amount of the debt, was left to the jury and found for the plaintiff.

In regard to the possession, we have already suggested that the right of possession follows the right of property. But further, supposing the attaching creditor had a right to attach the property subject to the plaintiff's mortgage, and so that the original taking was not tortious ; the answer is, that as the plaintiff is pursuing a remedy under the laws of Massachusetts, he must take such remedy as her statutes afford. The right to attach mortgaged property is conditional. If the attaching officer has notice of the mortgagee's debt, and it is demanded of him, and not paid within a time limited, Rev. Sta. c. 9, §§ 78, 79, the *casus fœderis* does not exist, and the statute expressly declares that the property shall be restored to the mortgagee.

If it be argued that the word "restored" implies that the property, at the time of the attachment, was taken out of the possession of the mortgagee, we think one answer is, and the law assumes, that it is taken out of the constructive possession of the mortgagee. But another, and perhaps more satis-

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factory answer is, that "restore," by the obvious meaning of the context and general tenor and object of the law, has a larger and more generic meaning, equivalent to the direction that it shall be surrendered and delivered to the mortgagee, from whom it is detained by the officer without law and against right. If there be any question respecting the right of possession as between the mortgagor and mortgagee, it would not be affected by such a surrender.

6. It was further insisted by the defendant's counsel, that trespass and not replevin was the proper action in this case. It has been decided in several instances, that where personal property, under mortgage, is attached, and afterwards, when the mortgagee has given notice of his debt, and made his demand, but neither the officer nor attaching creditor pay the mortgage debt, although the original taking was lawful, trespass will lie. This probably proceeded on the doctrine, that an officer, by abusing or erroneously exercising his authority, becomes a trespasser *ab initio*. But if trespass would lie in this case, it does not follow that replevin will not; on the contrary, in general, when trespass will lie replevin will also. But by our statute replevin will lie, for a wrongful detention only; and here, though the original attachment might have been lawful when made, the subsequent detention was wrongful, and replevin is the proper remedy.

Judgment for the plaintiff.

PHILIP GREELY & others vs. THE TREMONT INSURANCE
COMPANY.

The distinguishing characteristic of a general average loss is, that it is voluntarily incurred by the owner of one of the subjects at risk, for the benefit of all; and the cutting away of the masts, with the consequent damage, are none the less general average charges, because the vessel was in ballast at the time, and therefore there was neither cargo nor freight to contribute.

A general average loss is not to be added to the costs of repair, in order to show that such costs would exceed one half of the value of the vessel, so as to constitute a constructive total loss.

If the expenses of repairs upon a vessel, occasioned by a peril insured against,

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including general average charges, would exceed half the value of the vessel, the assured would not be entitled to recover of the underwriters for a constructive total loss, without regard to any discrimination between damages constituting a partial loss and general average loss; and such estimated cost would not constitute an actual total loss.

If a ship, after a disaster, remains *in specie*, under the control of the assured, and there is not, in fact, a total loss, independent of a sale by the master, such sale cannot make it so.

THIS was an action of assumpsit, brought in this court, on a policy of insurance, made by the defendants, dated November 7, 1845, whereby they insured the plaintiffs, in the sum of \$2,250, on one half of the brig Napoleon, for one year from the 8th day of November, 1845. The brig was valued at \$4,500, and the policy was in the usual form of Boston policies.

The interest of the plaintiffs was admitted, and the following facts were agreed upon by the parties.

In October, 1846, the brig sailed from Boston for Havana, where she arrived, and afterwards sailed thence for Cardenas, in ballast, without any charter-party of affreightment, or any rate of freight agreed upon, on the strength of a letter from Mathews & Safford, that a freight would be given to her on her arrival at Cardenas. On her passage, she encountered a severe gale, in which she lost her maintopsail, and was thrown nearly on her beam ends, and her ballast shifted, (there being no cargo on board,) in consequence of which, it became necessary to cut away her masts, which, with the sails and rigging, were thereby lost. Her stern boat was carried away; her rails and bulwarks, and a part of her deck, were damaged by the falling of the masts, and some of her sheathing, at the water's edge, injured by them. She was carried by the gale and currents upon the Florida coast, and finally put into Key West, (being assisted by a wrecking vessel, which towed her in,) and was there sold by the master, after a survey, in which a sale was recommended.

It is conceded that, if all the expenses of repairing the vessel were to be combined, (including those occasioned by the cutting away of the masts, and consequent loss of sails and rigging, and other expenses which the defendants say

should be estimated as in the nature of general average contribution,) the total amount, after deducting one third new for old, would be sufficient to constitute a constructive total loss; and that, unless such expenses are included, the cost of other repairs would not suffice to constitute one. And if, upon these facts, the court shall be of opinion that the plaintiffs are entitled to recover for a constructive total loss, the case is to be sent to an assessor, to compute the amount due.

And, for the purpose of facilitating the final disposal of the case, if the court should be of opinion that the plaintiffs are not entitled to recover for a constructive total loss, upon the ground above stated, it is conceded, for the purposes of this hearing, that all the expenses of repairs, made necessary by reason of the disaster, would exceed half the value of the vessel, as stated in the policy, and her actual value, in order to raise the question, whether, upon such a state of facts, the plaintiffs would be entitled to recover for a total loss, without regard to discrimination between damages in the nature of partial loss, and those in the nature of general average, or claim for a constructive total loss. But if the court shall be of opinion that, upon such proof, the plaintiffs would be entitled so to recover, the defendants shall have the right to go to the jury upon the point of fact, if they shall so elect, whether such expenses would exceed such value. If the court shall be of opinion that the plaintiffs cannot recover for a total loss, on either ground, the case is to be sent to an assessor, to make up the amount due for a partial loss.

C. T. Russell, (C. P. Curtis, with him) for the plaintiffs.

C. G. Loring, for the defendants.

SHAW, C. J. This is an action of assumpsit on a policy of insurance on the brig Napoleon, whereby she was insured to the plaintiffs for one year, from the 8th of November, 1845, for \$2,250, being one half of the value.

On a voyage within the time, from Havana to Cardenas, in Cuba, in ballast and without cargo, on the expectation, caused by a letter, of receiving a freight there, she encountered

a severe gale, in which she lost her maintopsail, and was thrown on her beam ends, in consequence of which it became necessary to cut away her masts, which, with the rigging attached thereto, were lost, and caused other damage to the vessel. She got into Key West by the aid of a wrecker, where, after a survey, she was sold.

The plaintiffs claim for a constructive total loss, on the ground that the vessel was so much damaged by the perils insured against, that it would cost more than half her value to repair her; and, therefore, according to the rule prevailing in Boston, the assured had a right to abandon, and recover for a total loss.

It is argued that, if all the expenses of repairing the vessel were combined, including those occasioned by cutting away the masts and the consequent damage, the sum, after deducting one third new for old, would exceed one half her value, and constitute a constructive total loss; but, without including those repairs, the cost would not amount to enough to constitute a constructive total loss.

It is contended, on the part of the defendants, that all the damages occasioned by the cutting away the masts are in their nature general average charges, and are not to be included in deciding the question, whether it would cost more than half the value, deducting one third, according to the rule, to repair the vessel and make her seaworthy; and, therefore, that it is not a constructive total loss within the rule.

1. The first question is, whether the loss occasioned by cutting away the masts, under the circumstances, is to be considered general average charges; and the doubt stated on the part of the plaintiffs arises from the fact found, that the vessel had no cargo on board; and, therefore, it is contended, that there was neither cargo nor freight to contribute, and the whole loss must be borne by the vessel, and, consequently, that it was not general average.

But the court are of opinion, that the circumstance that the vessel was in ballast, when the cutting away the masts occurred, makes no difference.

The masts were voluntarily cut away; and this is the

distinguishing characteristic of general average loss. The imminence of the danger makes no difference; if a cable is voluntarily cut, and the vessel is afterwards saved, it is not less a general average charge, that there was reasonable, or even strong ground to believe, that, without such cutting, the cable would have soon parted. It was a voluntary act at the time it was done, and this gives it its character. *Reynolds v. The Ocean Insurance Co.* 22 Pick. 191.

By the law of insurance, a general average loss upon the subject insured is to be paid in full by the insurer, without deduction, and without reference to the question, whether the vessel, if it happen to be a vessel, can or cannot be repaired, and at what cost, in reference to her value. It is a loss already incurred, and become fixed, before the assured is called on to determine what would be the cost of repairs, in reference to the value of the vessel; or whether, under his contract, he has a right to abandon, as for a constructive total loss, in case the cost, after deduction of the usual one third new for old, will exceed one half the value. A general average loss is different in its nature, in its cause, and in the mode of adjustment and recovery, from that of a partial loss. That the question depends upon the nature of the loss, and not on the fact that there are other contributory interests, as cargo and freight, seems settled by authorities. *Potter v. The Ocean Insurance Co.* 3 Sumner, 27; *Pezant v. National Insurance Co.* 15 Wend. 453; *Potter v. Washington Insurance Co.* 4 Mason, 298.

The underwriter is liable directly to the assured for a loss, in its nature a general average loss; that is, resulting from a voluntary sacrifice or its necessary incidental consequences, without waiting to collect contributory shares from other parties, unless, indeed, the same person be owner of both vessel and cargo. *Maggrath v. Church*, 1 Caines, 196; *Watson v. Mur. Insurance Co.* 7 Johns. 57.

But the rule does not apply where the assured is owner of the vessel and cargo. Then, as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and, therefore, is clearly *pro tanto* indemnified,

and cannot collect of the underwriter a sum of money, to be recovered back by the underwriter of himself.

These cases confirm the principle, that a loss by voluntary sacrifice is different in its nature from a loss by the other causes acting on the subject of insurance, and gives a different right to the assured. And the question does not depend on the fact, whether there are, in any case, separate interests to contribute, but the result is the same as between the insurer on the vessel and the assured, as if the assured were owner of the vessel and cargo, and entitled to the freight.

2. Assuming that a loss occasioned by a voluntary sacrifice of part of the vessel is in its nature a general average, we are of opinion that such loss is not to be added to the costs of repairs, in order to show that such costs would exceed one half of the value of the vessel, so as to constitute a constructive total loss.

This rule of regarding a vessel as so much deteriorated by losses, within the perils insured, that she cannot be repaired but at a cost exceeding half her value, is generally adopted in American jurisprudence, though it is believed that it does not prevail in England. It is said by Mr. Chancellor Kent to have come from the French law, and that it is found in the treatise known as *Le Guidon*. 3 Kent's Com. 329.

This constructive total loss occurs, and the right to abandon arises, when the ship is so far damaged as to become unnavigable without great and expensive repairs, and the rule in this country, for the sake of certainty, is fixed at one half her value. This has been modified in the Boston policies, by a provision, that the insured shall not have a right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment, as of a partial loss, shall exceed half the value of the vessel insured.

This right is plainly founded on the principle that, where the risk and expense of restoring the vessel are great, and disproportionate to the expected benefit and objects to be obtained by a repair of the vessel, the assured may, by notice of abandonment, and surrender of the vessel to the under-

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writers, claim at once a total loss, according to his contract. The property is regarded as substantially gone from the power and control of the owner, to all useful and beneficial purposes.

In estimating this expense, to determine whether the assured has thus a right to abandon and demand a total loss, the court are of opinion, as well from the principle on which the right is founded as from the course of judicial decisions in this commonwealth, that a general average loss is not to be added to the cost of repairs. *Orrok v. Commonwealth Insurance Co.* 21 Pick. 456; *Hall v. Ocean Insurance Co.* 21 Pick. 472; *Reynolds v. Ocean Insurance Co.* 22 Pick. 191.

It has been supposed that the case of *Sewall v. The United States Insurance Co.* 11 Pick. 90, is an authority for a contrary rule. But, when understood, we think it is not so.

The vessel, in that case, had actually filled and sunk in deep water, off Chatham, and was under water at the time of the abandonment. She had a valuable cargo on board, not destroyed by being under water. The question was, whether it would cost more than half her value to take her from the place where she was, and bring her to a suitable place, and make the necessary repairs. She was raised, and towed to Boston. The whole cost of this proceeding was apportioned on the vessel and cargo, according to their respective values. This was inadvertently called general average, because there was this apportionment. But it wanted the character of general average in this, that no voluntary sacrifice was made or expense incurred, by the owner of one of the subjects at risk, for the common benefit of both, by design and purpose. It was the cost of taking the vessel from the place where she was sunk by the direct force of a peril of the sea, and bringing her to a place of safety; and this expense was called an average, because it was shared with the cargo, saved by the same means. And in the opinion the court says, "the sum paid for removing the vessel to a safe place, where she could be repaired, was not technically a general average." This was clearly so. The actual loss had been incurred by the peril of the sea, and not by the will or act of man; and the proper

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question was, whether, taking the vessel as she lay, she was worth taking up and bringing in to be repaired, and could this be done for half her value ?

The costs of bringing a vessel to a port of refuge for repairs, are often spoken of, in works and cases of insurance, as general average charges ; and in many cases they are properly so called, because they are incurred in consequence of the deliberate determination of the master, after damage sustained by peril of the sea, to change his course, and put into a port, other than that of his destination, for repairs, by means of which these expenses are voluntarily incurred, for the benefit of all concerned. But such was not the case of the *Marshal Ney*, on which the decision of *Sewall v. The United States Insurance Co.* was founded. No expense was incurred in pursuance of any determination or act of the master, in the management of the voyage. That case, therefore, affords no authority for the position that general average charges are to be included, in making up the loss of fifty per cent, to constitute a constructive total loss.

3. Upon the hypothetical question, the court are of opinion that, if the expenses of repairs, *including* general average, would exceed the value of the vessel, the plaintiffs would not be entitled to recover, without regard to any discrimination between damages constituting a partial loss and general average loss, and such estimated cost would not constitute an actual total loss. The ship remained *in specie*, under the control of the assured, and unless there was in fact a total loss, independent of the sale by the master, such sale did not make it so.

THE ATLANTIC COTTON MILLS vs. JOSIAH G. ABBOTT.

A., with others, signed a paper by which they agreed to pay the sums set against their respective names, towards the capital stock of a contemplated corporation, for which the charter had not then been obtained. By this paper it was stipulated that such capital stock should not be less than \$1,500,000. The charter was afterwards obtained, and the corporation organized, and at the first meeting of the subscribers, the capital was fixed at \$1,350,000. A. paid the first assessment on his five shares, four of which he afterwards transferred on the books of the company, and attempted to assign the fifth, but the corporation refused their assent, and brought an action against him for unpaid assessments on such share; and it was held that the plaintiffs had not complied with the condition precedent upon which A.'s obligation to pay depended; and that neither the taking of his shares by A. nor his payment of one assessment constituted a waiver of the condition of his promise to pay, contained in the subscription paper.

THIS was an action of assumpsit, brought in this court, to recover the amount due for nine assessments, of one hundred dollars each, upon one share of the capital stock of The Atlantic Cotton Mills, with interest from the time when they were respectively payable. In January, 1846, a subscription paper was circulated for an intended corporation, and the defendant agreed to take and pay for five shares. It was submitted to the court on an agreed statement of facts, which sufficiently appear in the opinion of the court.

If upon the facts, the court shall be of opinion that the plaintiffs are entitled to recover the whole or any part of the sum claimed, judgment is to be rendered accordingly, with costs; otherwise the defendant to recover costs.

F. C. Loring, for the plaintiffs, cited *Worcester Turnpike Corporation v. Willard*, 5 Mass. 80; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *The Franklin Glass Co. v. Alexander*, 2 N. H. 380; *The Delaware and Schuylkill Canal Navigation v. Sansom*, 1 Binney, 70; *The Huddersfield Canal Co. v. Buckley*, 7 T. R. 36.

H. F. Durant, for the defendant, cited *The New Bedford and Bridgewater Turnpike Corporation v. Adams*, 8 Mass. 133;

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Phillips's Limerick Academy v. Gilbert, 2 Pick. 579; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23; *Same v. Same*, 9 Pick. 187; *Littleton Manufacturing Co. v. Parker*, 14 N. H. 543; Rev. Sts. c. 38, §§ 12, 13; *Sargent v. Essex Marine Railway Corporation*, 9 Pick. 202; *Sargent v. Franklin Insurance Co.* 8 Pick. 90; *Eames v. Wheeler*, 19 Pick. 442; *Franklin Glass Co. v. Alexander*, 2 N. H. 380; *Delaware and Schuylkill Canal Navigation v. Sansom*, 1 Binney, 70; *Huddersfield Canal Co. v. Buckley*, 7 T. R. 36.

SHAW, C. J. This is an action of assumpsit brought to recover nine assessments laid on one share in the stock of the Atlantic Cotton Mills, established at Lawrence, formerly Methuen. The company was incorporated February 3, 1846, with authority to hold a capital of \$2,000,000. The company was subsequently organized, and by vote fixed the capital at \$1,350,000, and the shares at \$1,000 each. Mr. Abbott subscribed for five shares, four of which he afterwards transferred. After paying one instalment of \$100 on the other share, he made a transfer of it to Mr. Butler, which the officers of the company declined to accept, and no transfer was made on the books. Nine assessments of \$100 each were afterwards made, and notified both to Mr. Abbott and to Mr. Butler, but they have not been paid; and this action is brought to recover those assessments, with interest thereon.

It is perfectly well settled, and it is so conceded in the argument for the plaintiff, in the present case, that by subscribing for and taking shares in a manufacturing company, whether any assessment has been paid or not, the stockholder comes under no personal obligation to pay for any assessment which may be laid on such share, and that the only remedy of the company to obtain payment of any, is by a sale of the share in respect to which it is made.

This being admitted to be the general rule of law, this action is brought to recover on an agreement expressly alleged to have been made by the defendant to the plaintiff company, to take, and pay for said five shares. This alleged promise

is contained in a subscription paper not dated, but which it is apparent from its tenor was made before the act of incorporation was obtained.

It contains a preamble, stating that it is proposed to obtain a charter for a company, for the purpose of manufacturing cotton, with a capital of not less than one and a half million, nor more than two millions of dollars. It then proceeds thus :

“ In contemplation, therefore, of carrying forward the above plan, we, the undersigned, agree to take and pay for the amount of stock set against our names, as the same may be assessed and called for by the directors of the company, when it shall have been organized.”

No distribution of the stock into shares being then made, the subscription was in dollars, and to the above-described paper the defendant subscribed five thousand dollars.

It was argued in behalf of the defendant, that this was a preliminary mutual agreement amongst the subscribers, with each other, that the corporation not being then in existence, it contained no promise to them, and that it could not enure to them afterwards, that no consideration existed, and, therefore, that no action could be maintained upon it. On the contrary it is insisted that it was proposed, in the nature of a continuing offer, to pay the company, when organized, that it was never revoked, until the company came into existence and was organized, and actually assigned the shares to the defendant, which was a good consideration.

There have been many analogous cases, in regard to several kinds of corporations, depending upon somewhat minute distinctions; and if the case necessarily depended on this subject, we should find it necessary to examine them more critically.

But there is another point relied upon, which is, that the subscription and promise of the defendant related to a company contemplated to be formed with a capital not less than one and a half million dollars, whereas the plaintiff company was organized upon a capital of \$1,350,000, and has never exceeded that sum.

It is to be recollected that the promise of the defendant, to pay assessments on shares, is collateral to his subscription,

and is relied on as creating an obligation, over and beyond that which arises by law from his taking shares. If it imposes such obligation, it is by force of the express promise only; and if such promise is conditional, the condition must be strictly complied with.

This is true of every kind of express promise or obligation, upon a condition precedent; but it is eminently true of an undertaking to take shares in a company to be formed. *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23.

There the subscription for shares, and the express promise to pay assessments, was made after the company was incorporated. But it was also held that the promise was provisional, and no stockholder could be held by it to pay assessments until the whole number of shares was taken. *Salem Mill Dam Co. v. Ropes*, 9 Pick. 187.

This depends upon the same principle. The defendant, by subscribing \$5,000, never promised to pay more than 5-1500th parts of the whole capital, or 1-300th part of the whole; when, if this action could be maintained, he would be compelled to pay 1-275th part of the capital. The promise sued upon, therefore, is a promise which he did not make.

But it is urged that, by taking the five shares, after the capital was fixed at \$1,350,000, he waived the condition of making it depend on \$1,500,000. But let us ask, waived what condition?

So far as the subscription paper operated as a promise, honorary or otherwise, to take \$5,000, in a stock not less than \$1,500,000, his taking the same amount, in a stock of \$1,350,000, was a waiver of the condition on which such engagement to take was founded.

But the promise to pay was collateral, and not incident to the taking of shares; and, therefore, taking shares in another and smaller capital was not a waiver of the condition on which the promise to pay for shares in a larger stock was made.

The same considerations apply to the suggestions, that the defendant was probably at the meeting, at which the company was organized and the capital fixed, and may be presumed to have assented to it; and also, the fact, that paying one assess

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ment, with a knowledge of the fact, he is estopped from denying his acquiescence in the reduction of the capital. This is true, so far as those acts bind him; he is estopped from denying that he took shares, and was a holder of shares, in a company of different capital from that contemplated by the subscription paper, and that he is bound by all the obligations which the law annexes to that relation. But these acts are not a waiver of the condition of an express promise, collateral and not incident to such relation.

Judgment for the defendant.

JOHN CURTIS vs. EBENEZER FRANCIS.

H. conveyed by the following description: "A certain piece of land, wharf and flats, beginning at a point on the easterly side of Sea street, at the southwesterly corner of D.'s wharf, and from said corner running in a direction of about south sixty degrees east, bounded northerly on said D.'s wharf and flats, to the channel or low water mark; then beginning again at said corner of D.'s wharf, and running south eleven degrees west by said Sea street one hundred and thirty-three feet; then turning and running in a direction of about south sixty degrees east (parallel with the northern boundary line on said D.) to the channel or low water mark, and bounded southerly by other land and flats of me, the said H.; thence running northerly by the channel to the easterly end of said northern boundary line." The course of south sixty degrees east from the southwesterly corner of D.'s wharf coincided with the water line of said wharf for a considerable distance, at the end of which the line of the wharf turned and ran northerly about twenty feet, and then turned again and ran in a line nearly parallel with the first towards the channel. The true line between the flats of H. and the flats of D., commencing at the southwesterly corner of D.'s wharf, ran south forty-five degrees east to the channel. Held, that the northern boundary line of the premises conveyed followed the line of D.'s wharf to the first jog, and then struck the true line between the flats of D. and of H., and followed that line to the channel; and that the southern line of the premises conveyed was parallel with the northern line thus established; although both D and H., at the date of this deed, supposed the true line between their flats to run from the southwesterly corner of D.'s wharf in a straight line to the channel; and although, by the construction given by the court, the southern line of the premises would run so far to the southward, that a small portion of its easterly end would cross flats not owned by the grantor.

A title, acquired by the tenant, without the concurrence of the demandant, after the commencement of a real action, although pleaded at the first term after it is

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acquired, will not bar the demandant; especially when it is merely a title under a mortgage, even if the tenant has given the demandant notice that he is in possession for the purpose of foreclosure.

In a real action brought by C., the owner of a strip of flats running from the upland to the channel, against F., his coterminous proprietor on the south, to recover a portion of flats, a judgment and opinion of the court rendered in favor of D., the coterminous neighbor of C. on the north, upon a statement of facts, upon which two real actions, brought by D. against C. and F. respectively, to recover portions of their flats, were submitted to the court, with power to determine the boundary lines, upon the evidence introduced by either party, and to draw such inferences of fact as a jury might draw, is admissible in evidence of the boundary line between D. and C. at that time, on proving by oral evidence that it has not been changed since.

When the judge, on the trial of a real action to recover a parcel of flats, instructs the jury, at the request of the tenant, that it may be shown, by occupation and conveyances, that the proprietors of the flats in question had agreed that the dividing lines between their estates should run in a certain direction, and that upon such evidence the jury may presume releases and conveyances between said proprietors, establishing such line, since lost; the tenant cannot except to the judge's, at the same time, calling the jury's attention to the peculiarity of the law in relation to the ownership of flats, that there can be no disseisin of them but by actual occupation, as affording a ground of improbability that any such agreement, releases or conveyances have been made.

Under the provisions of the Rev. Sta. c. 101, the rents and profits to be recovered upon a writ of entry are to be computed from six years before the date of the writ to the time of the verdict.

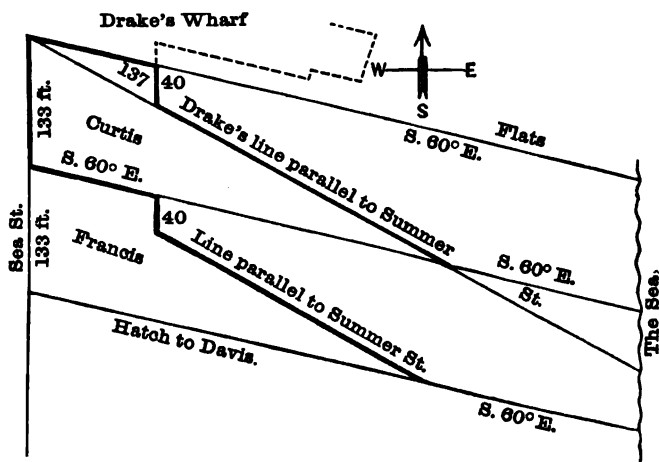
WRIT OF ENTRY, dated December 30th, 1839, to recover a portion of a wharf and flats, "bounded and described as follows: Beginning at a point on Sea street, in Boston, on the line which divides the land of said Curtis from the land of said Francis; thence running southeasterly to land of Thomas B. Wales, at a point on the northeasterly side of Wales's wharf, distant about three hundred and ninety feet from said Sea street; then turning and running more easterly by land of said Wales two hundred and sixty feet; then turning a right angle, and running northerly eighty-five feet; then turning, and running northwesterly to a point on the northerly side of a wharf by John and Thomas Howe, distant six hundred and twenty feet from said Sea street; then turning and running more westerly to the point of beginning." The demandant counted on his own seisin within thirty years. The parties stated a case, in substance as follows:—

Both parties claim under conveyances from Jabez Hatch.

The demandants, to maintain their title, put in evidence a deed, dated September 23d, 1811, from said Hatch to John Curtis and Thomas Ridley, purporting to convey to them in fee "a certain piece of land, wharf and flats, with the building thereon, situated at the southeasterly part of said Boston, at Wheeler's Point, so called, bounded as follows, namely: Beginning at a point on the easterly side of Sea street, at the southwesterly corner of Capen & Drake's wharf, and from said corner running in a direction of about south sixty degrees east, bounded northerly on said Capen & Drake's wharf and flats, to the channel or low water mark; then beginning again at said corner of Capen & Drake's wharf, and running south eleven degrees west by said Sea street one hundred and thirty-three feet; then turning and running in a direction of about south sixty degrees east (parallel with the northern boundary line on said Capen & Drake) to the channel or low water mark, and bounded southerly by other land and flats of me, the said Hatch; thence running northerly by the channel to the easterly end of said northern boundary line; or however otherwise bounded; being part of the estate devised to me by my honored father, Jabez Hatch, late of said Boston, deceased." Ridley's interest under this deed was duly conveyed to Curtis on the 9th of March, 1818.

The tenant offered in evidence a deed to David Moody, (from whom, by sundry mesne conveyances, the tenant derived his title,) from Jabez Hatch, dated March 9th, 1818, purporting to convey in fee a certain piece of land, wharf and flats, bounded as follows: "Beginning at a point on the easterly side of Sea street, at the southwesterly corner of land which I conveyed to John Curtis and Thomas Ridley, and from said corner running in a direction of about south sixty degrees east, bounded northerly on said Curtis and Ridley's land and flats, to the channel or low water mark; then beginning again at said corner of Curtis and Ridley's land, and running south eleven degrees west by said Sea street one hundred and thirty-three feet; then turning, and running in a direction of about south sixty degrees east (parallel with the northern boundary line on said Curtis and

Ridley) to the channel or low water mark, and bounded southerly by land and flats of Thomas B. Wales; thence running northerly by the channel to the easterly end of said northern boundary line; or however otherwise bounded; with all the privileges and appurtenances to the same belonging the above granted premises being part of the estate devised to me by my honored father, Jabez Hatch, late of said Boston, deceased." The tenant also gave in evidence the division of the estate of Jabez Hatch, Senior, among his heirs, on the 14th of September, 1786; and a deed dated February 7th, 1804, from Jabez Hatch, Jr., who derived his title under said division and by conveyances from the other heirs, to Isaac P. Davis and others, of the land and flats next southerly of the land conveyed to Moody; and two plans accompanying said division and deed; from all of which it appeared that the parties thereto supposed the true lines of the flats to run in a straight line in the direction of south sixty degrees east to the channel. The tenant also gave in evidence an indenture, executed on the 26th of November, 1834, by Francis, and by Wales, who had acquired the title of Davis and others, defining and establishing the boundary line between their estates as a straight line, running south sixty degrees east to the channel. The boundaries of the demanded premises may be better understood by the following plan :



The tenant also offered in evidence four deeds of mortgage, made by the demandant in 1818, 1821, 1823 and 1832, of the premises described in the deed of September 23d, 1811, all of which, since the commencement of this action, have been duly assigned to, and are now held by the tenant, and the sums secured thereby are unpaid.

"If, upon such part of the evidence before recited, as is by law competent and admissible, the court shall be of opinion that no part of the demanded premises passed to the demandants under the conveyances aforesaid, the verdict is to be entered for the tenant; otherwise, the cause is to stand for trial, unless this court shall be of opinion that, by reason of the existence of the mortgages of said Curtis, so held by the tenant, this action cannot be maintained, in which event the demandants are to become nonsuit, for that cause."

This case was twice argued. After the first argument, at the present term, the court delivered an opinion in favor of the demandant, ordering the case to stand for trial. The tenant then moved for a reargument of the case, which was granted, and a second argument had at November term, 1852.

R. Choate, F. B. Crowninshield, and J. M. Bell, for the demandant.

I. The direction of the lines of owners of flats adjacent to those of the demandant has been settled in cases heretofore adjudged. *Gray v. Bartlett*, 20 Pick. 186; *Valentine v. Piper*, 22 Pick. 85; *Sparhawk v. Bullard*, 1 Met. 95; *Drake v. Curtis*, 1 Cush. 395. Both parties claim under the same grantor, the demandant having the elder title; the deed under which the demandant claims is therefore to be construed most strongly in his favor, as against the grantor and his subsequent grantee. 4 Cruise Dig. (Greenl. ed.) tit. 32, c. 20, § 13 and note; *Marshall v. Niles*, 8 Conn. 369; *Carroll v. Norwood*, 5 Har. & Johns. 163. The course and the monument of the demandant's northern line being inconsistent, the monument governs. *Hart v. Spaulding*, 19 Pick. 445; 1 U. S. Dig. Boundaries, pl. 15; 2 U. S. Dig. Deed, pl. 483; 1 U. S. Dig. Suppt. Boundaries, pl. 37; 4 Cruise Dig. (Greenl. ed.) tit. 32, c. 21, § 31, and note. The course is not certainly stated in the deed the

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monument is ; the less certainty yields to the greater. *Benedict v. Gaylord*, 11 Conn. 336 ; *Massie v. Watts*, 6 Cranch, 148 ; *Cudney v. Early*, 4 Paige, 209. Land is an abuttal or monument, and controls courses and distances. 2 Cruise Dig. (Greenl. ed.) tit. 32, c. 21, § 31, note ; *Cleaveland v. Flagg*, 4 Cush. 81 ; *Clark v. Burt*, 4 Cush. 396 ; *Dall v. Brown*, 5 Cush. 294 ; *Cherry v. Slade*, 3 Murph. 82 ; *Bradberry v. Hooks*, 2 Taylor, 1 ; *Witherspoon v. Blanks*, 1 Taylor, 110 ; *Smith v. Murphy*, 1 Taylor, 303 ; *Den v. Green*, 2 Hawks, 218. When boundaries in a deed are inconsistent, those are to be retained which best subserve the prevailing intention manifested in the deed. *Gates v. Lewis*, 7 Verm. 511 ; *Jackson v. Sprague*, Paine, 494 ; *Wing v. Burgis*, 1 Shepl. 111. The manifest intention of Hatch, the grantor, was to convey to the demandant a parallelogram, one hundred and thirty three feet wide throughout. By no construction can this be effected. The greatest approximation then must be made ; and this is done by the demandant's construction. The northern line being fixed, the southern line is parallel thereto so far as the flats of Hatch extend, and then deflects upon the line of Wales, and runs by that line to the water. Parol evidence is admissible to show the line of Drake's flats, upon the principle which admits it to show the location of other monuments. *Linscott v. Fernald*, 5 Greenl. 496 ; *Claremont v. Carlton*, 2 N. H. 373 ; *Blake v. Doherty*, 5 Wheat. 359, *Wing v. Burgis*, 1 Shepl. 111. The fact, that the tenant is without remedy, if true, should not prejudice the demandant, claiming under an elder title.

II. The mortgages purchased by the tenant, pending the suit, cannot affect the demandant's right to recover.

C. G. Loring and *S. Bartlett*, for the tenant.

The cardinal rule, applicable as well to deeds as to other contracts, is, that the intent of the parties, as derived from the deed itself, is to govern the construction, if that intent be consistent with the rules of law. And although it is a general rule that, where monuments referred to in the deed are in conflict with courses and distances, the former shall govern ; yet to this rule, there is a well settled exception, that wherever

the monuments referred to are in plain contradiction of the intent of the parties, as shown by the whole deed taken together, they yield to that intent. 4 Cruise Dig. (Greenl. ed.) tit. 32, c. 20, §§ 1-9, and notes; *Davis v. Rainsford*, 17 Mass. 207; *Thatcher v. Howland*, 2 Met. 41; *Van Wyck v. Wright*, 18 Wend. 157; *Linscott v. Fernald*, 5 Greenl. 496.

The description, in the deed from Hatch to Curtis and Ridley, shows the intention of the parties to bound the premises conveyed on the north by one straight line, by Capen & Drake's wharf, as far as that extended, and then in the same direction, being south 60° east, to the channel. *Dawes v. Prentice*, 16 Pick. 435. The description of the north line gives one visible monument, namely, the wharf; one direction for the whole line, namely, south 60° east; and one abuttal, namely, Capen & Drake's flats. The abuttal should yield to the monument and course; especially as that abuttal is not a visible monument; for the rule that monuments shall govern is founded on the reason that they are open, visible, and less liable to mistake than courses and distances. *Davis v. Rainsford*, 17 Mass. 207; *Pernam v. Wead*, 6 Mass. 131; 4 Cruise Dig. (Greenl. ed.) tit. 32, c. 21, § 31, note; *Gates v. Lewis*, 7 Verm. 511; *Lincoln v. Wilder*, 16 Shepl. 169. The words "and flats," were added merely by way of repetition, and as a description of the supposed ownership of the adjacent land. Besides, if the tenant's construction be adopted, the line, after leaving the wharf, will still run upon "Capen & Drake's flats," though not along their southern boundary. The supposed rule, that the grantor must have intended to convey what he owned, cannot apply in this case; for, even upon the demandant's construction, Hatch conveyed the flats from Sea street to the end of Capen & Drake's wharf, thus disregarding his legal ownership. The intention of Hatch to convey a parallelogram one hundred and thirty-three feet wide, extending from Sea street to the channel, is also clearly shown by the description of the southern boundary line as parallel with the northern boundary line; which it cannot be, upon the demandant's construction, for by that it would, before reaching the channel, strike the flats already conveyed by

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Hatch to Davis, in 1804. And that conveyance, as well as the other deeds and plans in the case, show that all the owners of these flats recognized and acted upon the boundary lines as running south 60° east. Any other construction will deprive the tenant of a large portion of his estate, without remedy.

II. The tenant is mortgagee in possession under conveyances made by the demandant's ancestor, and this, if shown *puis darrein continuance* bars the action; for otherwise, a judgment for the demandants, if obtained in this suit, might be pleaded in bar of any future action by the tenant on his mortgage title against the demandant; or at least the tenant might be put to a new action to recover the very possession which he now holds, and is legally entitled to. *Miner v. Stevens*, 1 Cush. 482; *Root v. Bancroft*, 10 Met. 47; *Evereden v. Beaumont*, 7 Mass. 76; *Poor v. Robinson*, 10 Mass. 134; *Keech v. Hall*, 1 Doug. 21; *Thunder v. Belcher*, 3 East, 449; Jackson on Real Actions, 168.

DEWEY, J. The premises in controversy, with a much larger tract adjacent, were formerly the property of Jabez Hatch, under whom both parties derive title; the demandant, under a title of earlier date, being by virtue of a deed from Hatch to John Curtis and Thomas Ridley, bearing date September 28th, 1811, and a subsequent deed conveying, to Curtis, Ridley's interest in the estate thus conveyed; the tenant, under a deed from Jabez Hatch to David Moody, bearing date February 23d, 1814, and by subsequent conveyances by the grantee, and those holding under him, to the tenant. The parties before us are the owners of contiguous lots; and the question is one of boundary line between their respective lots. As Hatch was the owner of the entire tract held by both parties under these deeds, at the time he made the conveyance to Curtis and Ridley, and the tenant derives title by deed from Hatch, executed many years afterwards, it is only necessary for Curtis to establish the fact, that the demanded premises were embraced in his deed, to give him the better title, as against Francis, holding under a junior deed.

The question before us is upon the construction of the deed of Hatch to Curtis and Ridley, of the date of September 28th, 1811. The southern line of the Curtis lot is the matter more directly in question, as it is that line that adjoins the land of Francis; but as, by the deed to Curtis and Ridley, the southerly line of the lot conveyed to them by Hatch is to be parallel with the northern boundary line on Capen & Drake, to the channel or low water mark, the location of the northern boundary line is first to be settled, and, that having been established, it will, as it is contended by the demandant, control the southern, which is to be parallel with it, and giving the width of 133 feet to the lot.

On the part of the tenant, it is contended that the northern line is to run without deflection, in conformity with the line of Capen & Drake's wharf, about south 60° east, to low water mark.

On the part of the demandant, it is contended that the northern boundary line is upon Capen & Drake's wharf, so far as the wharf extends, and the residue of the line is upon Capen & Drake's flats, irrespective of the line of the flats, being in a continuous straight line with the wharf, and in truth, as is now shown, being a deflecting line, and deviating very considerably from a course south 60° east.

In the absence of monuments, or other controlling circumstances, a conveyance, in which the boundary line was stated to be one running from some given point to another point would imply a straight line; and a conveyance by a line described as of a certain course by the compass, would be assumed to be a straight line.

But the great question will be found to be, whether the familiar and well settled rules of law, that courses and distances, indicated in a deed, are to yield to monuments and abutments, described as boundaries in the deed, where there is a conflict between the courses and distances and such monuments or abutments, are to be applied to the present case. Are there any such controlling monuments given in this deed; or is it merely the case of a boundary running from one given

point to another, with nothing to require its course to deviate from one continuous straight line ?

It is strongly urged upon us, that the intention of the parties demands the construction, that the north line shall be a straight line, and in the course of about south 60° east. The cardinal rule on that subject is very well stated by one of the counsel for the tenant, and is precisely that which we adopt in the present case, to wit, "that the intent of the parties, as derived from the deed itself, is to govern the construction."

The case of *Dawes v. Prentice*, 16 Pick. 435, a case much relied upon by the tenant for other purposes, illustrates and applies the rule, and shows that the intention which the court are to regard is not that loose and general purpose floating in the mind of the party, but that precise intent which the language of the deed requires to be inferred, when it speaks in plain language. The court, in the opinion there given, admit, that the probable intention of the parties to the deed was to convey the land according to the boundary claimed by the demandant ; but held, that, inasmuch as the parties had designated the controverted line in the deed itself by a monument, the line of the monument must control, and the particular intent must control the general intent. The above case strikingly illustrates what must be the ruling of the court in the case now before us. Assuming, for the purposes of the argument, that the parties supposed that the south line of the flats of Capen & Drake would be a line of about south 60° east, and that it would be substantially a straight line, and that the description would convey to Curtis a tract lying in the shape of a parallelogram ; yet, if the language of the deed carries with it the particular intent, namely, that the north line of the land conveyed is to be bounded on Capen & Drake's flats, that is the intent to which effect is to be given ; and the general purpose, that the line should be a straight line, must yield to the particular purpose expressed in the deed.

As to this matter of intention, which the counsel for the tenant so strongly urge upon us, the case of *Cornell v. Jack-*

son, 9 Met. 150, is very much to the point. That was a case where the question arose upon a conveyance, in which the boundary was thus: "On the north, by land of Tolman;" and it appeared in the case, that the grantor in the deed in question and the said Tolman had, before the making of this deed, by parol agreed as to the course of this line, put up stakes, and the parties had actual occupation according to the line agreed upon, yet, upon the establishment of the true line of Tolman, it being found to differ from the reputed line and the line of occupation, the court held, that the true line of Tolman's land was the boundary to which alone effect could be given in construing the deed. In the opinion pronounced in that case, by Wilde, J., he says: "It has been argued, that it must be presumed that the grantor intended to convey the premises in conformity with the conventional lines, because he supposed, at the time of the conveyance, that those were the true lines; and this may well be. But he also must be presumed not to have intended to convey any part of the adjoining lots, to which he had no valid title. The question therefore is, not what land was supposed to be conveyed, but what land was actually conveyed; and this must be determined by the description in the deed."

The case of *Cornell v. Jackson* was an action of covenant broken, and presented the question in the form the tenant says this demandant should have done, namely, by an action against Hatch, or his representatives, seeking to hold the party to warrant what was supposed to have been the premises conveyed. But if the case just cited is sound law, most clearly Curtis could not have charged Hatch upon his covenant of warranty, for any failure of title of any land north of Capen & Drake's flats, if the flats are the boundary given in this deed.

It is then urged, that the line of the flats of Capen & Drake was not a visible monument to the eye, and, for that cause, should not be allowed to control the courses stated in the deed.

It is true, that a line of boundary "by the flats" of an adjacent proprietor may not be so obvious a monument as some

others. But that a boundary on the lands of A., whether the lands of A. be wild land, without any visible monuments, or actually enclosed, has all the controlling effects of a monument in limiting the extent of the grant, is quite certain. It is a very usual form of conveyance, and, when adopted, it places upon the deed a boundary line that is controlling, and overrides all loose and general suppositions of the parties, as to the location of the land granted. Whether it be called an abuttal or a monument, the effect is the same. In looking at our own volumes of reports, numerous cases will be found where full and controlling effect has been given to a boundary on the land of an abutter. It was thus in *Howe v. Bass*, 2 Mass. 380, which was decided on such a boundary. In *Pernam v. Wead*, 6 Mass. 131, a boundary "on the land of A." was called by Parsons, C. J. a fixed monument. In the cases of *Crosby v. Parker*, 4 Mass. 110, *Cornell v. Jackson*, 9 Met. 150, *Flagg v. Thurston*, 13 Pick. 150, *Clark v. Burt*, 4 Cush. 399, and *Cleaveland v. Flagg*, 4 Cush. 81; full effect was given to a boundary on the land of a third person, as a monument; and yet, in many of these cases, the true and legal line was not only one without any visible monument; but there was another line supposed by the parties to be the true line, and having fences, or stakes, or other external evidences of a line.

In *Cox v. Couch*, 8 Barr, 147, it was held, that where land is described in a deed of conveyance by courses and distances, and also by calls for the line of the adjoining owner, if there is a discrepancy, such calls for the line of the adjoining owner invariably govern. The like doctrine is found in *Carroll v. Norwood*, 5 Har. & Johns. 63; *Eaton v. Thayer*, 3 Green, (N. J.) 71; *Cherry v. Slade*, 3 Murph. 82.

The case of *Dawes v. Prentice*, 16 Pick. 435, is strongly urged upon us, as analogous to the present, and as furnishing a precedent that should lead the court to adopt the construction, that the north line is a straight line. But the cases are, in truth, widely different. In *Dawes v. Prentice*, the line was thus described, namely, "from Purchase street to the capsill of the wharf, about one hundred and fourteen feet, and from

thence down to low water mark ;” but by this boundary the court held, as very clearly they must, “that the line below the wharf is to run the same course as the line of the wharf ;” and for the plain reason, that there was nothing to indicate a change of course below the wharf. The present case has, as a part of the description, just what was wanting in the case of *Dawes v. Prentice*, a monument or abuttal below the wharf, namely, “the flats of Capen & Drake,” and that is a new call that must be answered. But for the introduction of the “flats” as a part of the northern boundary line, the northern line might have been held a straight line. The parties have introduced them, and they must have their proper effect.

The argument, on the part of the tenant, assumes that the grantor has, by the language of his deed, carefully and accurately described the direction of the northern line by a monument, namely, the wharf of Capen & Drake, and by the course of about south 60° east to the sea, and that the description “by the flats of Capen & Drake,” is a mere repetition of the boundary before given, by way of indicating the supposed ownership of the adjacent tract by Capen & Drake. If the facts had been so, the argument would certainly be one deserving consideration, upon the ground, that the latter recital should yield to the former, if there was a discrepancy. But the fallacy of this position lies at the very threshold. There is no such primary description of a boundary on Capen & Drake’s wharf, and thence continued in a course about south 60° east to the sea. The flats are not introduced by way of repetition of the boundary ; they are as much a part of the original recital of the northern boundary line, as the wharf is, and used in precisely the same way ; and the wharf may as well be rejected as a boundary as the flats ; and the latter must be held to be as much a portion of the first description of the boundary as the former. The precise language of the deed is this : “Running in a direction of about south 60° east, bounded northerly on Capen & Drake’s wharf and flats to the channel or low water mark.” The flats and the wharf are alike boundaries of a fixed character, and wherever

they are found to be, that is the northern boundary of the land conveyed.

It is strongly urged here, that the fact, that the wharf and the course of south 60° east nearly correspond, should lead to the rejection of the flats as a boundary, if the flats are inconsistent with the course of south 60° east; but this would be to give to the course, stated as it is in the very general form of expression of "about" so many degrees, a controlling influence over an abuttal, as a boundary, which cannot be sanctioned. It would be to control that most familiar form of boundary, namely, "on the line" of the adjacent owner, which manifestly indicates the particular purpose of the grantor, as limiting it to that line.

It is then further argued, that the description, "bounded northerly on Capen & Drake's flats," may be fully answered by adopting the line claimed on the part of the tenant, that is, a line running through and dividing Capen & Drake's flats; and it is said that, in such case, the northern line of land conveyed will be literally on a part of Capen & Drake's flats. But such a construction of this deed is, in our view, entirely unwarrantable. It is the external line of Capen & Drake's contiguous flats, that is referred to in the deed as a boundary, not a line running through their flats and dividing them. That a conveyance of land, purporting to be bounded on other lands, cannot be so construed as to include any of the lands on which it is so described as bounded, was directly decided in the case of *Nash v. Atherton*, 10 Ohio, 163.

It is in the next place insisted, on the part of the tenant, that if the northern line be thus established, as a line having for its boundary the flats of Capen & Drake, yet the southern line cannot be made parallel with it through its entire length; as the dividing lines of flats, as now settled, would so far swing round as to embrace a portion of the flats formerly sold by Hatch to Davis; and, that being so, the southern line will not answer the description in the deed, "bounded by other lands of me, the said Hatch," for the whole length of the line. The fact is so, and it is a consideration to be weighed, in connection with the other facts of the case, in giving a construc-

tion to the deed. But it has no such decisive character as seems to be claimed for it. The fact, that this comparatively small gore will fail of answering the calls of the deed on the southern line, furnishes no good reason for giving such a direction to the northern line as would leave Curtis with a much larger parcel of Capen & Drake's flats embraced in his deed from Hatch. So, too, there is this further distinction between the discrepancy on the northern and that on the southern side. On the northern line, to deviate from the line of Capen & Drake's flats is to abandon wholly the boundary "by the flats of Capen & Drake," so prominently set forth in the deed. To deviate from the parallel southern line, for that portion cut off by a prior conveyance to Davis, is still to give effect to the southern line as described, namely, as "bounded by other lands of Hatch," as it will be so for a very considerable part of the line. It is also to abandon what the parties have taken as their starting point, or line first to be settled; and abandoning that because, although that can be clearly located by the call in the deed, the small portion of the southern boundary, which is the last line to be located, cannot be carried out for its entire length.

It would have been very easy to have introduced such a description for the northern line as would require a location in a straight line from the place of beginning, the "southwesterly corner of Capen & Drake's wharf." It was only necessary to say, "thence running in a straight line south 60° east, to the channel or low water mark." But with this monument for a starting point, and, with this facility for describing it as a straight line, the parties elect to make the northern line one that shall correspond with the line of Capen & Drake's wharf and flats, and introduced these monuments or abutments as indicative of their particular intent as to the northern boundary. Finding this to be the language of the deed, we can only apply the rules of law, as we find them settled and applied to other cases and other parties.

It was also strongly urged that the line of Capen & Drake's wharf, extended in a continuous straight line, had long been recognized as the boundary of the Hatch estate on the north.

It is said to have been so in the plan and division of Jabez Hatch, Senior's, estate, in 1786, and by Jabez Hatch the younger, in 1804. This may be all true, and yet may have resulted from a general misapprehension of all interested, as to the legal line of the flats adjoining those uplands. It has been equally misunderstood by other parties, and cannot control the legal lines, when, by the terms of the deed, they are made to constitute the boundaries. It was so in *Cornell v. Jackson*, and in *Cleaveland v. Flagg*; but the true line was held the boundary when the party took a deed bounding on the land of another.

We can entertain no doubt as to the legal construction that must be given to the deed of Hatch to Ridley and Curtis, that the northern line of the premises conveyed by that deed is to be ascertained by taking the line of Capen & Drake's wharf, as it existed in 1811, so far as the same extended, and for the residue of the line, taking the true line of Capen & Drake's flats to the sea, or low water mark, deviating from a straight line, if need be, to conform to the line of those flats, and giving the proper width as stated in the deed, with a southern line parallel with the northern line thus established.

Until a comparatively recent period, it may be true, as has been stated, that it was generally supposed, by the owners of these lands, that the side lines of the upland were to be extended in the same direction to low water mark. But in the various cases decided in this court, beginning with *Rust v. Boston Mill Corporation*, 6 Pick. 158; *Valentine v. Piper*, 22 Pick. 85; *Piper v. Richardson*, 9 Met. 158; the doctrine that the side lines, in certain localities, were not to be thus extended in conformity with the upland, came to be pretty well understood, at least to be often judicially declared. The result has been that Valentine recovered land of Piper which Piper had supposed was his, Piper has recovered from Drake, and Drake from Curtis. By the decision of this court, Drake's flats were found to be so located as to cause a deviation from the course of the line of those flats as it was formerly supposed to run. Drake's flats swing round upon Curtis's supposed

line. Curtis, in turn, seeks to swing round upon Francis, his next neighbor, keeping his 133 feet in width, which he was to have by his deed. His title being older than Francis's, and from the same source, may give him this right, upon the proper construction of his deed. To hold him not so entitled would be to cut him off entirely from the sea, although his grantor, when he conveyed to him, was the owner of the adjacent land now claimed of Francis. That would be the result if his northern boundary line was, by the terms of the deed, necessarily a straight line from the end of Capen & Drake's wharf. If Curtis shall succeed in maintaining his action, and Francis has not the like power to swing round upon his southern neighbor, it is because his title is a junior one, or by reason of the description of his boundaries, or some other sufficient cause, that confines him to the remnant that remains, be the same more or less, after giving effect to the deeds of Hatch to Curtis and Ridley, and Hatch to Davis. As to that, however, no question is now before us, and I have alluded to the subject only because it seemed proper, in reply to some of the remarks of the counsel for the tenant, urging upon us the great injustice that would result from a decision against his client.

Another point was taken in the defence of a distinct character, and one not affecting the general question of title, but as a ground for defeating a recovery by the demandant in the present action. The tenant has, since the commencement of this suit, become, by purchase, the assignee of certain outstanding mortgages, made by the ancestor of the demandant; and this fact he now relies upon in bar of the further maintenance of this action.

It is quite sufficient to say, in answer to this line of defence, that evidence of an outstanding title acquired by the tenant after the institution of the suit, is inadmissible. Especially should it be so held, as respects the acquisition of an outstanding title of a mortgagee of the demandant. If it were otherwise, no one who had mortgaged his estate, however small the incumbrance, could safely institute an action at law to settle a controverted title with a third person, without the

hazard of being defeated of his judgment, after a protracted and expensive litigation, by such new rights acquired under a mortgagee. The cases cited warrant no such defence, but the contrary is the well settled law. *Andrews v. Hooper*, 13 Mass 472; *Hall v. Bell*, 6 Met. 433; *Tainter v. Hemenway*, 7 Cush. 573; *Purlin v. Haynes*, 5 Greenl. 178.

Whatever may be the effect of acts of the demandant, subsequently to the commencement of the action, in defeating his action, by making an entry on the tenant, or by a release from himself of all his interest to the tenant; it is quite clear, that a title, acquired from a third person pending the suit, cannot avail the tenant in defence of such action.

No sufficient ground being shown for a nonsuit, the case, under these rulings of the court upon the questions submitted to them, will, according to the agreement of the parties, be submitted to the jury, as to other questions that may be properly put in issue. *Case to stand for trial.*

A trial was accordingly had in this court at November term, 1853, before *Merrick*, J. who made the following report thereof:

"The tenant pleaded *nul disseisin*, by direction of the court as and for the general issue, and filed in addition, as a specification of defence in bar to the further prosecution of the suit, an averment, that as assignee of certain mortgages made by the demandant's ancestor, the tenant, since the last continuance, namely, on the 14th of December, 1853, had notified the demandant that thenceforth he should hold possession of the lands described in said mortgage deeds, for condition broken, and for the purpose of foreclosing the same. The tenant offered to put in evidence to maintain said specification, but the judge ruled, reserving the question, that the facts, if established, would be no legal bar to the further prosecution of the suit.

"To maintain the issue, the demandant offered in evidence a deed of Jabez Hatch to John Curtis and Thomas Ridley, dated September 23d, 1811. Also, a deed of said Ridley's administratrix, who was duly authorized to make the convey-

Curtis v. Francis.

ance, to said Curtis, of his interest in said land, dated March 9th, 1818. The demandant then offered the record of a judgment heretofore recovered in this court, in a suit, wherein one Tisdale Drake was demandant, and John Curtis, the ancestor of the demandant in this suit, was tenant. To this evidence the tenant objected; but the court ruled that said judgment was admissible as evidence to show the true boundary line between the estate of said Curtis and said Drake, at the time when the action wherein it was rendered was commenced; and that it was competent for the demandant to show that the question in controversy between the parties, on the trial of said action, and which was determined therein, was solely in relation to the boundary line between their respective estates according to the titles by them severally held, at the date of the conveyance by said Hatch to said Curtis and Ridley, except so far as the same was affected by the subsequent disseisin and adverse possession of said Curtis, and Curtis and Ridley.

"The demandant also, to show what was the question in controversy between the parties on the trial of said action, and which was determined therein, offered in evidence an agreed statement of facts entered into by the counsel in said suit of *Drake v. Curtis*; also a paper, purporting to be a memorandum of the opinion of the court, in said suit, which memorandum, it was agreed by the tenant should be deemed and taken to be the opinion of the court delivered upon said statement of facts. [Said statement of facts and memorandum of opinion are copied in the margin.]" But to

* Suffolk.

Supreme Judicial Court, }
November Term, 1844. }

ANDREW DRAKE vs. JOHN CURTIS.

SAME vs. EBENEZER FRANCIS.

TISDALE DRAKE vs. JOHN CURTIS.

SAME vs. EBENEZER FRANCIS.

THESE are real actions to recover parcels of wharves and flats near Sea street, in Boston.

The two actions first named were brought by Andrew Drake in his lifetime, and he having died, leaving a will which has been duly proved, and which is made part of this case, whereby he devised the lands and flats in question to the said

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all the foregoing proposed evidence the tenant objected as incompetent; and the same was admitted by the court. The

Tisdale Drake, petitions were presented by the said Tisdale Drake to the court of common pleas, in which the said actions were pending, for leave to appear and prosecute the said actions. The presiding judge ruled *pro forma* that he had not a right to appear; and upon exceptions to these rulings the cases have been brought to this court. If, upon the argument of the bills of exceptions, this court should be of opinion that Tisdale Drake is entitled to appear and prosecute the said actions, originally brought by Andrew Drake, then the said Tisdale Drake is to be admitted to prosecute the said actions, and the title to the demanded premises is to be tried in those actions, and the said actions brought by Tisdale Drake are to be dismissed with costs; but if the court should be of opinion that the said Tisdale Drake has not a right to appear and prosecute the said first named actions, they are to be dismissed, and then the said titles are to be tried in the last named actions.

The parties agree to submit the question of title to the court upon such deeds, wills, &c., as they respectively rely on, each party agreeing to furnish to the other party a schedule of the documents he will offer, days at least before the time of trial. And either party, or the court, shall be at liberty to examine the surveyors employed by them. orally.

It is agreed that the court may determine the course of the lines running between high and low water mark, according to the legal rights of the parties, upon the evidence; and be at liberty to draw all such inferences of fact as a jury would be authorized to draw. If the tenant, in either action, shall elect to do so, he may afterwards submit to a jury any question of adverse possession to bar the demandant, or any claim of the tenant for betterments. If either of the said tenants should not so elect, the court is to render a judgment for the demandant or tenant, according to the lines settled by the court. If either of the tenants should so elect, a verdict is to be returned for the demandant for all the land and wharf to which he is entitled, according to the lines fixed by the decision of the court, except such part, if any, from which he is barred by adverse enjoyment; and subject to the amounts to be ascertained and fixed for betterments, if any, by verdict under the usual mode of proceeding when betterments are claimed, and if any claim is made for betterments the demandant may make a claim for rents and profits.

S. Bartlett, for E. Francis.

Choate & Crowninshield, for Curtis.

B. R. Curtis, for Drake.

“DRAKE vs. CURTIS. SAME vs. FRANCIS.

“July 6, 1846. WILDE, J. The opinion of the court in these cases, as to the principal objection made to the demandant's title, has been already suggested, and it is not necessary to repeat the reasons on which that opinion was founded. We were of the opinion that the cases must turn on the true location of the true north line of the lot of Jabez Hatch, from whom the tenants derive their title. After this suggestion was made, the tenant's counsel moved the court to discharge the statement of facts, that the question as to the location of said line might be left to a jury. The question was not much pressed, and there seems to be no good reason

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demandant, for the same purpose, also offered the testimony of Tisdale Drake, to show that there had been no conveyance or agreement, known to him, between the parties to said suit of *Drake v. Curtis*, or their predecessors in the title, altering the lines of said estates, since said conveyance by said Hatch to Curtis and Ridley. To this evidence the tenant objected, but the court overruled the objection, and the witness testified as aforesaid.

"The tenant then produced from the files of said suit of *Drake v. Curtis*, and offered in evidence, a written motion of the counsel of the tenant to the court to set aside and relieve

why the parties should not be bound by their agreement, as we are not aware of any material fact by which the location is to be determined which is disputed by either party.

"The principal facts and conveyances on which the tenants rely are not denied, but the question is, whether they prove the direction of the line of Jabez Hatch's flats. These conveyances prove conclusively that Jabez Hatch claimed to hold by a line running about south sixty degrees east, and that he conveyed by that line to sundry persons under whom the tenants now hold the land in dispute. The entry under these undoubtedly gave a constructive possession of the flats in dispute. But such a possession, though good against a stranger, having no title or previous possession, will not operate as an ouster or disseisin of the true owner. When a disseisor claims to be seised by his entry and occupation, his seisin cannot extend further than his actual and exclusive occupation. 4 Mass. 418. But although these conveyances and claims of title do not amount to a disseisin, they may, if not proved to be founded on a mistake, be good presumptive proof of title. It is incumbent, therefore, on the demandant, to prove that the line, by which Jabez Hatch conveyed these flats, was not the true northerly line of his lot. And this, we think, is satisfactorily proved, and upon the same grounds on which the case of *Piper v. Richardson* and the previous cases were decided. These cases were considered with great care and attention; and, although the true division of the flats was not ascertained without some difficulty, yet on the whole evidence in those cases we were satisfied that the lots south of Summer street were to be divided by lines parallel with that street. That gave to each proprietor the full width of his lot, and, if so divided, would do equal justice to all; whereas, if Piper's claim had been established, great injustice would have been done to Richardson, for a greater part of his flats would have been cut off, and the lines of his flats had been so settled that he could not support a claim to the north of Summer street. We are still satisfied that our decisions in these cases were correct, and that this case must be decided on the same grounds; there is no material difference in the evidence Piper proved, in his case, that he had a constructive possession, under a conveyance of an ancient date, and it was then proved that divers proprietors of lots southerly of his claimed by the same direction, and not by lines parallel with Summer street."

the tenant from the agreed statement of facts hereinbefore referred to, as having been improvidently and by mistake entered into; but the court refused to admit the evidence.

"It was shown by testimony of the demandant's witnesses, that prior to 1810, Drake's wharf was built and extended down to the first jog on the plan, [*ante*, 430.] And the counsel of the tenant moved the court to instruct the jury that by the legal construction of the deed of Hatch to Curtis and Ridley, the northern boundary of the estate thereby conveyed was the entire south line of said wharf, as the same then existed, [as shown by the dotted line on the plan,] and not merely that part of said wharf which extended down to the first jog, as shown by said plan; but the court refused so to instruct the jury, but did instruct the jury that said wharf, constituted such boundary down to the first jog, and no further.

"The tenant offered the following written prayers for instruction by the court to the jury: 1st. That whether the judgment, in *Drake v. Curtis*, does establish, as between said parties, the south line of the estate of said Drake, as it existed at the date of the conveyance of said Hatch to Curtis and Ridley, is matter of law, to be determined upon the record, as applied to the localities as proved, or upon the other facts proved in the case. 2d. That said judgment, if admissible at all, as ruled by the court, is merely evidence tending to show where the south line of said Capen & Drake's flats was, at the time of suit brought between said parties, and not at the time of the conveyance of said Hatch to Curtis and Ridley. 3d. That as matter of law, in legal construction, the judgment in *Drake v. Curtis* of itself does not show that the south line of Capen & Drake's flats and estate was parallel to the lines of Summer street, but coincided only partially therewith; and that oral or other evidence to show from the course of the trial in that case that this may be explained, upon the ground that a question of disseisin by the tenant was raised and passed upon by the verdict, is inadmissible.

"The court acceded to, and adopted as part of its instructions to the jury, the propositions stated in the first and second of said prayers, and in the first part of the third prayer, but

declined to adopt the last clause in said third prayer; and instead thereof held that oral and other proper evidence was admissible, to show that a question of title by disseisin and adverse possession and occupation was raised and passed upon by the jury on the trial of that action.

"The court also instructed the jury that said judgment in the case of *Drake v. Curtis* proved what was the line of boundary between their respective estates at the time of the commencement of said action; and that if the evidence produced in the present case was sufficient to show that the line thus found by the jury, and established by the judgment, was found by the jury in that case upon and according to the title severally held by those parties at the date of the conveyance of Hatch to Curtis and Ridley, (except as it had been affected by the subsequent disseisin and adverse occupation of Curtis and Ridley,) it tended to prove also what was the line of boundary at that time. And the court further instructed the jury that this judgment, establishing this line between the lands of Drake and Curtis, was, *prima facie*, and in the absence of any other evidence upon the subject, sufficient evidence to establish the north line of Curtis's estate, and to authorize the jury so to find in this action, if the evidence satisfied them that no change had been made in the line between Drake and Curtis since the conveyance of Hatch to Curtis and Ridley in 1811; and that the north line of Curtis's estate being thus established, he was entitled to the land which would be included by a line one hundred and thirty-three feet distant therefrom and parallel thereto; it being conceded that Hatch was then the sole owner of that tract of land.

"And the court further instructed the jury that the instructions of the judge to the jury in the case of *Valentine v. Piper* were correct as explained in the opinion of the court reported in 22 Pick. 85; and afforded a rule of decision in this case, as far as upon the evidence before them, the cases were similar to each other.

"The tenant also prayed the court to instruct the jury as follows: That notwithstanding said judgment, it is open to the tenants to show by proof of the lines of occupation and

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conveyance, from the earliest period, of the estates south of Summer street, that the proprietors of said estates had agreed that the lines of their estates should be taken and deemed to run nearly in a direction of south 60 degrees east; and upon such evidence it is competent for the jury to presume releases and conveyances among said proprietors, establishing such lines, and that the same are now lost. To which prayer the court fully acceded, and instructed the jury in conformity to the request therein contained.

“ But the court, in the course of its charge to the jury, commented upon the evidence in this case relative to the said supposed presumption; and among other things, particularly called their attention to the peculiarity of the law in relation to the ownership of flats—that there could be no disseisin of them, but by actual occupation, and that no title by disseisin could be acquired thereof, except by an exclusive adverse possession—as affording a ground of improbability, that any such agreement, releases, or conveyances had been made.

“ In relation to the claim of the demandant for rents and profits, the court, for the purposes of the trial, reserving the question, instructed the jury that they must ascertain and compute the same from a period of six years prior to the date of the writ, down to the time of the verdict. The jury returned their verdict that the rents and profits thus computed amount to \$25,756, and that the betterments amounted to \$15,000.

“ If any of the foregoing rulings of the court are erroneous, the verdict is to be set aside, and a new trial granted in whole or in part as the whole court shall order accordingly; otherwise, judgment to be rendered on the verdict.”

The argument upon this report was had at November term, 1854.

C. G. Loring and *S. Bartlett*, for the tenant. 1. The specification of defence, that the tenant, as assignee of mortgages made by the demandant's ancestor, had notified the demandant, since the last continuance, that he should thenceforth hold for condition broken, was valid, if established. The former decision of this court, on this point should be revised.

for the following reasons : The only cases, in any court which are opposed to the tenant's position, are three in this commonwealth, and one in Maine, cited in the former opinion in this case, *ante*, 444. The only reasons given in these cases are, that the plea always refers to the commencement of the action; and that to allow a tenant, who holds without right at the time of the commencement of the suit, to avoid liability to pay costs, and acquire a right to tax costs, by the acquisition of an independent title, pending the litigation, by a cause over which the demandant had no control, might work great injustice. In all the cases cited, except from 7 Cush., the question was raised under the general issue, and not by plea *puis darrein continuance*; and undoubtedly the plea of the general issue refers to the commencement of the action, and not to the time of the plea. *Toms v. Powell*, 7 East, 536. Besides, if the tenant admit that the demandant was seised and disseised, he must plead all other matters specially. Jackson on Real Actions, 154. The reasons given for the decisions relied upon are unfounded. The clear rules of pleading in real, as well as in other actions, allow the defendant, by plea *puis darrein continuance*, to set up any bar which defeats the action. Jackson on Real Actions, 164, 165, 168; Gould Pl. 373. And no costs are given to the defendant up to the time of plea pleaded; and the plaintiff is deprived of costs by his own act. *Foster v. Jones*, 15 Mass. 185; *Lyttleton v. Cross*, 4 B. & C. 117; *Baker v. Morrey*, 1 Moore & Payne, 140. By the well settled principles of law, after condition broken, the title becomes absolute at law in the mortgagee. If a breach of condition merely had occurred, pending this suit, and the tenant had not acquired the title of the mortgagee, yet, as the demandant's legal estate had terminated, it might, perhaps, have been pleaded in bar *puis darrein continuance*; or, at least, if the holder of the mortgage had entered upon the tenant. Jackson on Real Actions, 143, 151, 168. The fact that the tenant has procured the title of the mortgagee, and given notice that he holds under it for condition broken, places the demandant in no better condition than if the same steps had been taken by the mortgagee. The tenant

does not put his case merely upon the equitable doctrine of rebutter; nor on the ground that the court will give effect to his rights to prevent circuitry of action; but upon a legal title, derived from the act of the demandant himself, in not performing a condition, which omission is as effectual, as far as the mere title is concerned, as if the demandant, since the continuance, had executed to the tenant a release. See *Parlin v. Haynes*, 5 Greenl. 180, 181; *Foster v. Jones*, 15 Mass. 185.

2. The admission in evidence of the judgment in *Drake v. Curtis*, coupled with the instruction with which it was accompanied, was erroneous. The judgment was between different parties, not privies of the plaintiff in blood or estate, and was rendered upon an artificial case founded upon the admissions of the parties to it. *Hurst v. M'Neil*, 1 Wash. C. 70; *Piper v. Richardson*, 9 Met. 156; *Sargent v. Salmond*, 27 Maine, 539; *Putnam Free School v. Fisher*, 34 Maine, 176; *Douglass v. Howland*, 24 Wend. 35; *Oakley v. Aspinwall*, 4 Comst. 514; *Lee v. Stiles*, 21 Conn. 500; *Baring v. Fanning*, Paine, 549; *Goundie v. Northampton Water Co.* 7 Barr, 233; *Green v. New River Co.* 4 T. R. 589; *Doe v. Derby*, 1 Ad. & El. 783; *Eastman v. Cooper*, 15 Pick. 276, 285; *Heard v. Lodge*, 20 Pick. 53; *Evans v. Rees*, 10 Ad. & El. 151; 1 Greenl. Ev. §§ 189, 523, 524, 535.

Even if the judgment was legally admissible, the evidence of the facts proved, and of the proceedings at the trial of the action of *Drake v. Curtis*, in order to show upon what grounds the jury, in that case, found their verdict, was inadmissible; for the tenant, being a stranger, cannot be compelled to come prepared to show or contest the principles or grounds upon which a jury in another case founded their verdict; and a recorded judgment cannot be added to or explained by the finding of a new jury upon the question of what ground the former jury proceeded upon. *Manny v. Harris*, 2 Johns. 24.

3. The instruction, that the northern boundary, in the deed of Hatch to Curtis & Ridley, followed Capen & Drake's wharf only down to the first jog, was erroneous; for that deed refers to the whole wharf, and so this court has held. It is no answer to this, to say that the line would not be straight:

or the same is true with the line, as settled by the court, after it leaves the wharf; it has to jump a long distance southwardly to find the line of Capen & Drake's flats. If, after arriving at the first jog, the line struck the true line of Capen & Drake's flats, there might be some ground for the construction that part of the wharf only was intended as a monument; but such is not the fact.

4. The comment of the judge upon the law as to the disseisin of flats, and his statement to them that this peculiarity of the law afforded a ground of improbability that any agreement had been made by the proprietors of flats south of Summer street, were erroneous, and calculated to mislead the jury.

5. The ruling of the judge, as to the time for which rents and profits were to be computed, was erroneous. Before the Rev. Sts. c. 101, the demandant's only remedy for rents and profits was by action of trespass, brought after recovery in a writ of entry, and in such an action the right of recovery was restricted by the general statute of limitations to six years before action brought. Stearns on Real Actions, 361, 408; Note of commissioners on Rev. Sts. c. 101, § 14. Chapter 101 of the Rev. Sts. has abolished this remedy, and provided that "the tenant shall never be liable for the rents and profits for any longer term than six years;" except when the sum due him for improvements exceeds the six years' rents and profits, in which case any rents and profits received by him prior to the six years, shall be applied towards the extinguishment of the difference, but there his liability shall cease. Rev. Sts. c. 101, §§ 18, 30, and commissioner's notes. The judge allowed the demandant to recover for more than twenty years' rents and profits; and as the value of the improvements, as found by the jury, is more than sufficient to absorb six years' rents and profits, the demandant should have judgment for the land only.

R. Choate and F. B. Crowninshield, for the demandant.

The opinion was delivered at March term, 1855.

SHAW, C. J. This cause has been long pending in this court, has been many times brought to the notice of the court

and at various stages has received a degree of consideration which the importance of the subject, and the intrinsic difficulty of many of the questions involved in it, have demanded. The action was commenced in 1839, shortly before that part of the revised statutes went into operation, limiting the time within which real actions should be brought, and in many respects altering the modes in which they should be conducted. A suit had been brought against this demandant, by Andrew Drake, the object of which was to recover a part of the flats claimed by Drake, on the northerly side of Curtis's wharf and flats; and Curtis, the tenant in that action, probably foreseeing that if that claim on the part of Drake, his coterminous neighbor on the north, should be successful, he, on the same principles, might have a claim against his southern coterminous neighbor, took the precaution to commence this action against Francis, before the change of the law. But we suppose that this suit was not actively prosecuted, until after the conclusion of Drake's suit, by which a parcel of flats was recovered against the present demandant, on his northerly side. Curtis thus having failed in the defence of the suit, brought against him by Drake, his coterminous neighbor on the north, prosecuted this action against Francis, his coterminous neighbor on the south, on the ground that if the direction of the lines, in which the flats were to run, towards low water, had been rightly fixed and established in the case determined, the same rule, applied to his southerly line, would carry his flats further to the south, and take in a part of the flats claimed by the tenant.

1. The first question, arising on this report, was considered in a former opinion; but as it has again been argued, we proceed to consider it again. It is thus stated in the report: The tenant, in addition to the general issue, filed a specification of defence, in bar to the further prosecution of the suit, an averment, that as assignee of certain mortgages, made by the demandant's ancestor, the tenant, since the last continuance, namely, on the 14th December, 1853, had notified the demandant that thenceforth he should hold possession of the land described in said mortgage deeds, for condition broken-

and for the purpose of foreclosing the same. It is not stated in terms, that the mortgages cover the whole of the same land, now in controversy, but we presume it was so intended, and the argument assumes it. Neither does it appear by the specification, that the tenant has acquired these mortgages since the last continuance, but only that, since the last continuance, he has given notice to the demandant of his intention to hold possession of the premises, for condition broken. We suppose, if relied on at all, as a bar to the demandant's action, it is the holding of a freehold title, under the demandant's ancestor, whether in possession for condition broken or otherwise, which is so relied on.

Nor do we suppose that it was the intention of the tenant to waive all other pleas, and all other grounds of defence, and rely only upon his title of mortgagee, and notice of holding for condition broken, which we suppose would technically follow a plea *puis darrein continuance* at common law.

But we have not placed much reliance on these considerations, because we think the question may well be decided on other grounds, more directly affecting the merits.

This action had been pending nearly fourteen years, when this plea was put in. But, in general, pleadings relate to the time of the commencement of the action, and if the plaintiff has a good cause of action, when his action is brought, the defendant cannot defeat it, by showing an outstanding title in a stranger, or procuring a new title to himself, after action brought. *Le Brett v. Pupillon*, 4 East, 502. In that case, it was said to be a settled rule of pleading, that no matter of defence, arising after action brought, could properly be pleaded in bar of the action generally. This is to be taken with the exception of an act done by the plaintiff or demandant himself, as when, in a personal action, he receives payment of his debt, or in a real action executes a release, or enters and ousts the tenant. It has been so settled by repeated decisions in this commonwealth, cited by the tenant. *Andrews v. Hooper*, 13 Mass. 472; *Hall v. Bell*, 6 Met. 431; *Tainter v. Hemenway*, 7 Cush. 573. In these cases, as well as in that of *Parlin v. Haynes*, 5 Greenl. 178, it was held that the tenant in a real

action, cannot defend himself on the ground of a title acquired by him after the action brought.

It is argued that the adjudications afford no sufficient authority for the position, where the tenant comes in and pleads a new title, acquired since the last continuance, because the reasons assigned for the rule, in the cases cited, are that it would affect the plaintiff injuriously, in the matter of costs; whereas, it is insisted, such effect would not follow, if pleaded as a new defence, which has arisen since the last continuance. We think the authorities cited go no further than to show, that, in the latter case, the tenant could recover costs, not for the whole suit, but only from the time of the plea pleaded; but not that the demandant would recover his costs up to that time.

But this is not the whole of the reason assigned for the adjudications. The reasons distinctly assigned by *Wilde, J.*, in *Andrews v. Hooper*, 13 Mass. 476, are, that "evidence of a title thus acquired, has been uniformly rejected in our courts. A different course would operate unequally and unjustly, by enabling the tenant to fortify a defective title, and avoid the payment of costs, for which he might otherwise be liable, and which, in the course of an expensive suit, might even exceed the value of the land." The same reason is assigned in the case in Maine.

But further, after a long course of decisions, we are not in the habit of looking only to the reasons given by the judge who draws up an opinion. A case takes its effect, as a judicial precedent, from the adjudication, though all the reasons on which it was founded, may not be given in full in the report of the case. It is now a rule of law well settled by authorities.

But if a mere legal, outstanding, absolute title, purchased after action brought, would not be a good defence, *à fortiori* the purchase of an outstanding mortgage cannot have that effect. A mortgage, under the laws of Massachusetts, is an estate of a very peculiar character, created and regulated by law. It assumes the form of a conveyance in fee, and vests a fee in the mortgagee for many purposes. But it is a defeasi-

ble estate, defeasible at law, by payment or other performance, before condition broken ; but in substance it is still defeasible in another form, after condition broken, and till foreclosure. Until then, it is not an absolute estate in the mortgagee. Until the mortgage is foreclosed, it is liable to redemption ; upon redemption the estate is restored to the mortgagor, or his assigns, with all its easements and other incidents. In the late case of *Ritger v. Parker*, 8 Cush. 145, where an easement for a right of way was established over one estate in favor of another, and the same proprietor became possessed of one tenement, either absolutely or as mortgagee in possession, and also of the other tenement as mortgagee in possession, holding to foreclose, it was held that there was no merger, no union of title by which the right attached to the dominant tenement was lost, or the servient tenement released ; because, upon redemption, the easements and other incidents would follow and pass with the estate.

And we think any other view would lead to great injustice ; and, in a case like this, we are to look at substantial rights, rather than forms, in order to do justice to parties. A mortgage is in form an estate in fee, and vests a legal estate in the mortgagee and his assignee. In substance, it is a security for money. If the grounds, on which the argument is rested in this case, are correct, the same result would follow, in a case where the party in a real action has established his title to a large estate, should the tenant become holder of an outstanding mortgage for ever so trifling an amount. But the nature of the two rights, and the remedies afforded by law, for the assertion of each, tend to show, that the principle of compensation or set-off, cannot apply to them. As well after as before foreclosure, there is a right of redemption, upon the exercise of which the title of the mortgagee is wholly defeated, as if it had never existed. So the remedies for each show that the principle of rebutter has no application. It is true, that a mortgagee has a right to bring a suit, in the form of a real action ; but it is a peculiar proceeding, and qualified by provisions of law. If successful, he can obtain a conditional judgment only, and on payment of a sum of money,

perhaps a small one, his judgment never touches the title. Besides, if this plea were allowed, how is the inquiry to be judicially conducted, to ascertain how much, if any thing, is due on the mortgage; how is it to be tendered or paid into court, and the mortgagor restored? Considering the diversity in the legal nature and effect of the two rights, and the remedies adapted to each, we think that the existence of one is not directly repugnant to, and subversive of the other.

But, in truth, it appears from a more careful examination of the earlier proceedings in this case, that the tenant has acquired no new title by the assignment of any mortgage to him since the last continuance, but that the mortgages in question had been held several terms; and the only matter relied on is, that since the last continuance, the tenant being in possession, had given notice to the demandant that he would thenceforth hold the estate for condition broken, and for the purpose of foreclosure. But this gives him no new estate; it does not change the character of his title to the estate embraced in the mortgage, and affords no new ground of defence. The opinion, therefore, heretofore given, in this cause, by Mr. Justice Dewey, is conclusive upon this point.

2. The next question arises from the admission in evidence, by the judge who tried the cause, of the record of a judgment previously recovered in this court, by Tisdale Drake, as demandant against John Curtis, the demandant in this suit.

In order duly to understand this question, and the law applicable to it, it will be necessary to take it in connection with the other facts, and the case which had preceded it, and the particular stage of the inquiry at which it was offered. The demandant and tenant both claimed under deeds of conveyance from Jabez Hatch; the demandant having the elder, and the tenant the junior conveyance. If, therefore, any portion of the controverted territory, being open and uninclosed flats, not built on or covered by any structure, but flowed by the tide, was embraced in the deed from Hatch to Curtis and Ridley; and if subsequently, in the deed from Hatch to Moody, through whom Francis claims, any part of the same flats was embraced; it necessarily follows that the

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latter must yield, because the grantee in the second deed could not take that which had previously been granted by the first.

And further, the case of *Drake v. Curtis* had previously been brought before this court, upon an agreed statement of facts, in which certain deeds and documentary evidence were agreed to, and the construction of which was submitted to the court, and a decision had been given on them. The principal subject of inquiry, in the case submitted, was the construction of the deed of Hatch to Curtis and Ridley, of the 27th of September, 1817; Ridley's part having been afterwards conveyed to Curtis. The object was to ascertain the northern boundary line of the flats conveyed to Curtis and Ridley; for, though the real subject of controversy between these parties, is the southerly line of Curtis's flats, yet as the southerly line of the flats conveyed by Hatch to Curtis and Ridley, was a line parallel to the northerly one, and at a certain number of feet (133) distant from it, ascertaining such northerly line would obviously fix the southerly one. The deed from Hatch to Curtis and Ridley, which the court were called on to construe, as fixing the northerly line of Curtis's flats, was in its descriptive part in these words: "A certain piece of land, wharf, and flats, with the buildings thereon, situated at the southeasterly part of said Boston, at Wheeler's Point, so called, bounded as follows: Beginning at a point on the easterly side of Sea street, at the southwesterly corner of Capen & Drake's wharf; and from said corner, running in a direction of about south sixty degrees east, bounded northerly on said Capen & Drake's wharf and flats, to the channel or low water mark." It is not necessary to follow the residue of the description, the above being the entire description of the northerly line in Hatch's deed.

Upon this description, it was contended, that as the wharf of Capen & Drake, as a solid structure, and fixed, visible monument, extended down about 133 feet, and coincided exactly, or very nearly, with the course of south 60° east, it was not only to be taken as a monument, as far as it went, but that it gave a direction to the residue of the line, being a straight line, to low water mark; and this construction was

strongly urged as the line intended, by the counsel for the tenant. But the court, applying the well-established rules of construction, especially the cardinal rule that monuments and abutments must control courses and distances, held that the wharf, so far as it coincided with the line called for, must govern, but beyond that "the flats of Capen & Drake" constituted an abutment, and must control the course and distance south 60° east to the channel, and there the line called for by Hatch's deed, from the point at which the fixed line of the wharf, as a monument, terminated, the true line of Capen & Drake's flats must govern; and although the parties intended one continuous line of south 60° east, because they supposed it the true southerly line of Capen & Drake's flats; yet this was subordinate to the more general intent derived from the language used, which intent plainly was to bound the grantee on the real and true line of Capen & Drake's flats. The grounds of this decision were stated in a full and very satisfactory manner, in the opinion heretofore delivered by Mr. Justice Dewey in this case.

We are now to consider another fact occurring in the anterior stage of these proceedings, which, in our opinion, has a material bearing upon the question, whether the judgment in the case of *Drake v. Curtis* was competent evidence in this case of *Curtis v. Francis*. We have already stated that the causes of *Andrew Drake v. John Curtis*, and *Tisdale Drake, devisee of Andrew, v. The Same*; and also the same demandants against Francis; and we may also add, the suits of Curtis against Francis, were all commenced before the 1st of January, 1840, when the revised statutes, respecting real actions, went into operation, and they were, of course, all pending in 1844. At the November term of that year, an agreement was entered into, by the parties in the first four cases above named, applicable to all the said cases. It will be perceived by the records in the two — for they were substantially but two, *Drake v. Curtis* and *Drake v. Francis* — that the south line of flats claimed by Drake extended so far south, that should it be ultimately established as his legal line, it would not only extend over a large part of the flats of Cur-

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tis, his coterminous neighbor on the south, but would also extend still further south, and include a portion of the flats claimed by Francis. When, therefore, Drake brought his action against Curtis, for the large portion claimed of him, he brought his action at the same time against Francis, for the smaller portion claimed of him. These actions were pending at November term, 1844, when the agreement was entered into for the disposition of those actions, to which Drake, Curtis, and Francis were parties. It will be perceived that the decisive question in both of them was, where the south line of Drake's flats should be drawn; because that would regulate the north line of Curtis's flats, and that would regulate the parallel south line of Curtis's flats, and the south line of Curtis's flats would regulate the line of Francis's flats. That south line of Drake's flats, therefore, was first to be determined and established according to the evidence, and the law applicable to the title of proprietors of flats under the colony ordinance of 1641. Of course Curtis and Francis had a common interest, in opposing and resisting the claim of Drake in the ensuing trial between *Drake v. Curtis*.

The first question stated was whether Tisdale Drake, as the devisee of Andrew Drake, who commenced the suit, could come in and prosecute, as the law then stood, and it was afterwards decided that he could not; (*Drake v. Curtis*, 1 Cush. 395;) after which, we believe, the suit of Andrew Drake was discontinued, and the suit of Tisdale Drake prosecuted. The agreement then proceeded as follows: "The parties agree to submit the question of title to the court, upon such deeds, wills, &c., as they respectively rely on, each party agreeing to furnish to the other party a schedule of the documents he will offer, days at least, before the time of trial. And either party, or the court, shall be at liberty to examine the surveyors employed by them, orally. It is agreed, that the court may determine the course of the lines running between high and low water mark, according to the legal rights of the parties, upon the evidence, and to be at liberty to draw all such inferences of fact as a jury would be authorized to draw."

The agreement then went on to reserve to the tenant in

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either action the right, after the determination of the court, to submit to a jury any question of adverse possession to bar the demandant, or any claim of the tenants for betterments, and rents and profits. If either of the said tenants should not elect to go to the jury, on the subject of adverse possession, the court were to render judgment for the demandant or the tenant, according to the lines settled by the court.

Upon this agreed statement, the causes came on to be heard by the court at March term, 1846, and both causes, that against Curtis, and that against Francis, were argued together. They were heard on the documentary evidence, the plans and surveys, and we presume, according to the agreement, the testimony of the surveyors. The causes were retained under advisement, until the close of the June adjournment 1846, when the opinion of the court was given by *Wilde, J.* The decision was favorable to the demandant, fixing the south line of the demandant, Drake, and the north line of the tenant Curtis, and the tenant Francis, according to the deed of Hatch to Curtis & Ridley of 1807, substantially according to the claim of the demandant, Drake. The tenants moved the court to discharge the statement of facts, that the question as to the location of said line might be left to a jury; but the motion was overruled by the court.

The case afterwards came to trial, we presume upon the right reserved to the tenants, to submit to a jury any right of adverse possession, to bar the demandant. The case came on to be tried before *Wilde, J.*, at November term, 1846, and was submitted to the jury, who returned a verdict in favor of Drake, the demandant. Various objections were taken to the ruling of the judge, and still more to the refusal of the judge to give certain directions prayed for, and these, as questions of law, were presented, on a report of the judge, for the consideration of the whole court. This case came before the whole court, in March term, 1848, and was elaborately argued, both orally and in writing, and, after consideration, the objections were overruled. The directions of the judge at the trial were held to be correct, and judgment was rendered on the verdict for the demandant. *Drake v. Curtis*, 1 Cush. 395.

This is the judgment which was offered in evidence, and admitted, under objection, in the trial of this cause. It was offered after evidence given of the deed of Hatch to Curtis & Ridley of September 23d, 1811, and in connection with evidence of the question in controversy in that suit, and the agreement under which it was tried. And the court are of opinion that, under the circumstances, it was competent evidence between these parties in this action.

We are aware that this particular case, in which these parties stand before the court in an adversary position, was not one of the cases, in which the agreement above cited was made. But this suit was then pending. It was as obvious then as afterwards, that in that action Curtis and Francis had a common interest to defend against the claim of Drake, and that if Drake could not succeed in recovering against Curtis, Curtis would have no occasion to proceed against Francis. It was therefore a common defence. Both of these parties did join in an agreement with Drake, upon the mode, and the facts and evidence, on which the main question should be tried, and that the whole question of fact and law, independent of mere adverse possession and disseisin, should be tried and decided. The causes of *Drake v. Curtis*, and *Drake v. Francis*, were argued together; we do not see why it was not as competent for Francis as for Curtis, under that agreement, by his counsel, to adduce evidence, to offer surveys and examine surveyors, to submit all legal considerations, upon the questions in which they had thus a common interest, and on the trial of which they had made common cause, by an agreement which both had made with each other, and with their common opponent.

We are quite aware that, according to the general rule, on a trial between parties, a prior judgment between one of them and a stranger is not competent evidence. It requires a careful consideration of the rule, however, to ascertain who is a stranger within its meaning. It is certainly not confined to a case, where the parties in the present suit were parties to the former; on the contrary, it is binding on all privies, either in blood, estate or interest. So of a warrantor who has notice of a suit, from one claiming under his warranty, with an op-

portunity to defend. So parties severally sued on a policy, who have agreed to abide. Perhaps no case can be found exactly like the present in its facts, but we think it quite within the principle governing this class of cases.

The evidence was offered in the present case to show what was the south line of Drake's flats when the suit was brought; and in addition to the presumption, that a line continues unchanged, when no deed or conveyance is shown to change it, we think it was competent to prove negatively, as far as such negative is capable of proof, that no such change had taken place.

It appears by the report, that to avoid the effect of this judgment, and the agreement under which the suit was prosecuted, the tenant in the present case produced from the files of said suit of *Drake v. Curtis*, and offered in evidence, a written motion to set aside and relieve the tenant from the agreed statement of facts before referred to, as having been improvidently and by mistake entered into, which was not admitted. The reason is to be found in the opinion of *Wilde, J.*, already cited, who says, that after the court had made a suggestion of what their opinion was, the tenant's counsel moved the court to discharge the statement of facts, but it was not much pressed, and there seemed to be no good reason why the parties should not be bound by their agreement.

We are therefore satisfied of the correctness of the instruction given by the court on the present trial that the judgment in the case of *Drake v. Curtis* proved what was the line of boundary between their respective estates at the time of the commencement of said action; and that, if the evidence produced in the present case was sufficient to show that the line thus found by the jury and established by the judgment, was found by the jury in that case, according to the titles of the parties, at the date of the conveyance of Hatch to Curtis & Ridley, it tended to prove also what was the line of boundary at that time.

3. Another question is raised upon this report, which it is somewhat difficult to make intelligible, without the aid of the plan. But as we understand it, it is thus: At the time of

Hatch's deed, the wharf of Capen & Drake, as a solid structure, extended down about 137 feet, the south side of which to that extent coincided with the line south 60° east, or very nearly so; and then (1811) the water line of the wharf turned north nearly at right angles with the line already mentioned, and distant 15 or 20 feet, at which point another section of the wharf projected, on a line nearly parallel with the first, and extended downwards towards the channel to some distance. The argument now is, that this lower section of Capen & Drake's wharf should, like the upper section, be deemed the monument, called for in Hatch's deed, as the northern boundary of his grant.

This construction, we believe, was never suggested or intimated, until since the opinion upon the construction of Hatch's deed, given by *Dewey, J.*, on the former hearing. In that, it was stated, perhaps without qualifying terms, that the solid structure of Capen & Drake's wharf was to be taken as the southern boundary called for, by that deed of Hatch to Curtis & Ridley. But the fact had then never been called to the attention of the court, that there was at that time another section of Capen & Drake's wharf, laying parallel to, and 15 or 20 feet northerly of the first section, as having any bearing upon the question of construction. The line insisted upon by the tenants was the face of the wharf as a monument so far down as it coincided with the course of south 60° east, (the first jog, as it is termed in the report,) and thence in the same direction to low water mark. The calls of the deed are two, namely, 1st by wharf; 2d, by flats. Taking the first monument, it is to be followed so long as the wharf continues in the prescribed direction south 60° east, and till the second is reached. As soon as the flats are reached, it then becomes necessary to seek the true line of flats, which is found southerly of the line of the wharf. And so we think there is no discrepancy, between the direction given on this trial, and that formerly given by the court as above stated. Undoubtedly, Hatch supposed that Capen & Drake's wharf was in the true line of their title to flats, and that he was conveying up to that line, by the designation of "Capen & Drake's wharf and flats." But though such may

be supposed to have been his intent, yet it is subordinate to his expressed intent to bound on Capen & Drake's wharf and flats, in the line designated, if that was the true line, but otherwise, so far as open flats were concerned, on the true southerly line of Capen & Drake's flats. Having found the true line of those flats to be south of a straight line below the point to which the wharf extended in that direction, there must then of necessity be a change to the nearest point on the true south line of Capen & Drake's wharf in order to satisfy this deed. This construction is put upon Hatch's deed, not because the parties had such a line in their minds, but because it is required by the rules of law, applicable to the descriptive words, in which they have expressed the grant made.

4. The court having, at the request of the counsel for the tenant, instructed the jury that it was competent to show by proof of occupation and conveyances of the estates south of Summer street, that the proprietors of said estates had agreed that the lines of their estates should run in a direction of nearly south 60° east, and that it was competent for the jury to presume releases and conveyances accordingly, and that the same are now lost, accompanied the instruction with a comment, which was objected to, as tending to mislead the jury. The court, in charging the jury on the evidence relating to such presumption, called the attention of the jury to the peculiarity of the law in relation to the ownership of flats, that there could be no disseisin of them but by actual occupation, and that no title by disseisin could be acquired thereof, except by an exclusive adverse possession, as affording a ground of improbability that any such agreements, releases, or conveyances had been made.

We cannot perceive that this comment was calculated to mislead the jury; on the contrary, it seemed called for by the terms in which the prayer was made. It is a well known rule of evidence, that from long actual, adverse and exclusive possession, a lost grant or release may be presumed. The tenant prayed the judge to instruct the jury in this rule of law, as applicable to the proprietors of estates south of Summer street. But the term "estates" is equivocal. It may mean enclosed

uplands, or open flats. The presumption from such possession of gardens, orchards, pastures or other enclosed and improved lands, would arise from one species of occupation. But adverse and exclusive possession cannot be predicated of flats, unless built upon, or actually enclosed. As the prayer did not distinguish between the lands above tide water, lying south of Summer street, and the flats lying below, and as flats were the subject to which the presumption was to be applied, it seemed proper and necessary, in applying the rule of law to the subject matter, to distinguish as to what would be an actual and exclusive occupation of the different species of estates.

5. The next question turns upon the claim of the demandant on the one side for the value of the rents and profits due to him, and of the tenant on the other for the value of improvements, made by him on the premises. On this subject considerable evidence was offered on both sides. In reference to this, the court instructed the jury, reserving the question of its correctness, that they must estimate and compute the rents and profits, from a period of six years prior to the date of the writ, down to the time of the verdict. The jury returned their verdict, that the rents and profits thus computed amount to \$25,756, and the betterments to the sum of \$15,000.

By far the most important point in this inquiry is, for what term of time the rents and profits shall be computed. The counsel for the tenant insist that by force of the statute, Rev. Sts. c. 101, § 18, rents and profits can, in no event, be computed for a longer time than six years. There is no doubt that, prior to the revised statutes, the sole remedy of the demandant, for rents and profits, was by an action of trespass for mesne profits, to be commenced after a recovery of seisin in a real action, and that the statute of limitations limited the time for which mesne profits could be recovered, to six years next before the action was brought. The rule was founded on the theory that the demandant must be reinstated in his title and right of possession, before he could have trespass, which would lie only for a violation of the right of possession.

But the revised statutes, for reasons fully stated by the com-

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missioners, have provided another and a different remedy and one which is not cumulative and additional to the former, but which supersedes and supplants it. The revised statutes having provided that no real action can be brought or maintained, except when the demandant has a right of entry, and of course a right of possession, the old theoretic objection, that a party having no right of entry, but only a right of action, could not have trespass, was done away; and they then provided that, instead of a subsequent action of trespass for mesne profits, the demandant, in his real action to recover his title, should make his demand for rents and profits, to be inquired into, tried, and embraced in the judgment; and it has been determined by this court, that this is the only remedy which the demandant, who is obliged to bring his action to recover his real estate, can have for rents and profits. *Raymond v. Andrews*, 6 Cush. 265.

The consequence therefore is, that by the same process by which a demandant claims his title, he claims his rents and profits; and by analogy to the old rule of law governing the action of trespass for mesne profits, limiting the claim to a period of six years before the commencement of the suit, the same rule ought to apply to the commencement of the real action under the revised statutes. And we are of opinion that that was the intent of the limitation expressed in the revised statutes. The statute, in that section, although it contains a limit of six years, yet it fixes no termini, no point of time at which it shall begin or end. Taking the analogy, taking all the provisions as a whole, and the reasons of the commissioners, we are of opinion that the limitation is six years before the commencement of the action, which, since the revised statutes, must be the real action. Then the question recurs, is it to terminate at the commencement of the action, or be brought down to the time of the verdict?

To say that it shall not be brought down, is to say that when one appeals to the law for redress of the wrong done him, in deforcing him, and unjustly holding him out of his estate, and after a long litigation, during which this holding out continues, the demandant establishes his title, and his

right to the possession and enjoyment of the premises, the law will afford him no redress. No such anomaly occurred in the old action of trespass for mesne profits, because the demandant did not commence his action for mesne profits until he had been restored to the possession, and of course to the enjoyment of the rents and profits, so that there was no occasion to recover for rents and profits, during the pendency of that action.

We think that a careful examination and comparison of the provisions of the statute will make this clear. Section 18 prescribes a period of six years, before the commencement of the real action, if the tenant had, for that or a longer time, wrongfully held the premises, as the limit of time, from which the rents and profits should begin to be computed; and as no provision is made for any after action, the computation is to be brought down to the time of the verdict, because the result of the main trial shows conclusively, that during all that time the demandant has been rightfully entitled to the possession and enjoyment of the estate, and all the rents and profits accruing from them, and that during all that time the tenant has received the benefits to which the demandant was entitled. We think, therefore, the rule laid down by the judge for the direction of the jury in this respect, was correct, and conformable to law; and that by the true construction of the statute, the six years therein mentioned, is six years next preceding the commencement of the action. The time during which this rule allowed the rents to be computed in this, was unusually long, because the action remained in court an unusual length of time, about fourteen or fifteen years.

The verdict for the balance of rents and profits, after deducting the amount of betterments, having exceeded the *ad damnum*, a motion was made by the demandant, for leave to amend his writ so as to enlarge the *ad damnum*, but the motion was overruled. Whereupon the demandant remitted the excess, and took judgment for the *ad damnum*.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF BERKSHIRE, SEPTEMBER TERM 1852,
AT LENOX.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF, } JUSTICES.
HON. GEORGE T. BIGELOW,
HON. CALEB CUSHING,

MEMORANDUM. The legislature, by an act passed April 20, 1852, directed that the number of the justices of this court should consist of six, instead of five, as provided by law. In pursuance of the above-mentioned act, the Hon. CALEB CUSHING, of Newburyport, was appointed a justice of this court; and took his seat on the bench at Boston, in the summer of 1852.

WILLIAM A. FORBES vs. THE AGAWAM MUTUAL FIRE
INSURANCE COMPANY.

A by-law of a mutual fire insurance company, which requires a subsequent insurance on the same property to have "the consent of the directors signified by a statement thereof in the policy, or by indorsement thereon signed by the secretary," is not complied with by the approbation of one of the directors of the company, indorsed upon the plaintiff's *application* for insurance, which application states that "the applicant asks leave to insure \$1,000 on same property, in some other company; please signify the assent of the company in the policy."
And the company cannot be held to have waived a compliance with the above

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by-law, and the rights of parties are not altered, because the same person acted as agent for both companies in issuing the two policies, or because the first company, long after the obtaining of the second policy, notified the plaintiff of an assessment due from him, and accompanied such notice with a schedule of losses claimed of the company, in which the claim of the plaintiff was included, and marked "unadjusted."

THIS was an action of assumpsit on a policy of insurance against fire, issued by the defendants on the 14th of August, 1850, whereby they insured, for one year from that day, certain personal property of the plaintiff, consisting of horses, carriages and livery stable stock, and situated at Great Barrington. The action was tried in this court before *Dewey, J.*, and was reported by him for the consideration of the whole court, with the agreement that if the subsequent insurance was a bar to the plaintiff's action, judgment should be entered for the defendants. The facts appear in the opinion of the court.

I. Sumner, for the plaintiff.

F. Chamberlin, (with whom was *W. Porter*), for the defendants.

SHAW, C. J. This is an action to recover on a policy, made by the defendants, to insure personal property of the plaintiff, consisting of horses, carriages, and livery stable stock, kept by the plaintiff at Great Barrington. The policy had been duly issued, through the agency of Henry Wheeler, agent of the defendants at Great Barrington, and the fire occurred within the term of one year specified in the policy.

There were several grounds of defence specified, but the only one ultimately relied on was, that, by the terms of the policy, the insurance should be forfeited if other insurance should afterwards be obtained on the same property, not assented to by the defendants, and that such insurance was obtained; by reason whereof this policy became void before the fire. The present policy was dated on the 14th of August, 1850, for one year from that day, to the 14th of August, 1851. The policy referred to the "application of the same date, lodged with the secretary, which said application shall form part of the contract, to be taken in connection with this policy." The act of incorporation and the by-laws of the company are annexed, and the policy, recognizing the plaintiff as a mem-

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ber, and acknowledging receipt of premium, deposit note, &c., insures him \$1,000 in the second class of risks, under the conditions and limitations expressed in the rules aforesaid Article 14 of the by-laws provides, that in case any other insurance, prior or subsequent, shall subsist upon property insured by this company, the policy issued by this company shall be deemed and become void, unless such other insurance subsist with the consent of the directors, signified by a statement thereof in the policy, or by an indorsement thereon signed by the secretary.

By these references to the by-laws and to the "application," and by the adoption of them into the policy, they became a part of the contract, as conditions and stipulations, in the same manner as if expressed in the policy. Assuming this to be so, the defendants offered evidence for the purpose of showing that, after the issuing of this policy, the plaintiff obtained insurance at The People's Mutual Insurance Company, on the 22d day of August, for another sum of \$1,000, which was in force when the fire occurred, in November of the same year.

To avoid this defence, the plaintiff contended that this subsequent insurance was known and assented to by the defendants, and that they waived a compliance with that article of the by-laws. For this purpose, he offered a memorandum, made by the applicant on his "application," which was on it when transmitted to the company, on which the policy in the present case was made, to this effect: "Applicant asks leave to insure \$1,000 on same property, in some other company. Please signify the assent of the company in the policy." And this application was approved, by an indorsement thereon, by A. D. Wait, director. It is contended, that this was a distinct notice that he intended to get such further insurance.

But we think this evidence is far from warranting the inference sought to be drawn from it. It certainly proves notice of the applicant's desire to have leave to make further insurance, and that this permission might be expressed in the policy. But it was not so expressed, and the non-compliance

with such an explicit request is almost as significant as a refusal. And the assent and approval of the director was an approval only of the application, and did not constitute the contract, or any part of it.

In this respect, it may be remarked that there is an obvious distinction between notice of a past and subsisting insurance on the same property, and notice of a desire or intention to obtain a future insurance; either of which, without the assent of the company, avoids the policy. A subsisting insurance already made, if there be one, is a fact, fixed and unalterable, and capable of proof. If notice of such be given in writing, then the company make their new policy with notice of it; they know certainly that the double insurance will subsist the moment the new policy is made; and it must subsist, therefore, by their act, and, of course, by their consent. But mere notice, that the assured wishes to make further assurance, to which they do not assent, and to which, when actually made, they have given no assent, cannot have the same effect.

But several other grounds of waiver of this stipulation, to avoid the policy in case of other insurance, are insisted on by the plaintiff. One is, that the same agent, through whom the policy of the defendants was obtained, acted for The People's Mutual Insurance Company, in effecting the second insurance. But waiving the question whether any agent, or subordinate officer, can waive an express stipulation in a contract already made and executed, or whether his agency had not wholly ceased for the defendants when he acted as agent for The People's Mutual Insurance Company, his mere knowledge of the making of the second policy could not amount to an assent on the part of the defendants. *Barrett v. The Union Mutual Fire Ins. Co.* 7 Cush. 175.

It was further insisted, that the claim of an assessment of the plaintiff, long after obtaining the second policy, was a waiver; because the treasurer, in issuing his note of assessment, indorsed, in a printed form, a schedule of losses claimed of the company, in which the claim of the plaintiff was included. But to this is appended a note, showing it "unad-

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justed ;" so that, on the face of it, it was a mere notice to the members of the company, from the treasurer, that such a loss was claimed, without any admission that it was allowed ; nor does it appear that, at that time, they were apprised of the fact on which their defence now rests, forfeiture by a subsequent insurance, not assented to.

A motion was made for a new trial, on the ground that the subsequent insurance of the plaintiff on the same property, by The People's Mutual Insurance Company, was void, because no assent to a previous insurance was given in their policy, and so, by a clause in their by-laws, that policy was void. But, upon an examination of the facts, we think this objection will appear to be without foundation. We have not the policy itself, issued by The People's Office, but we have an extract from it in the plaintiff's affidavit. The insurance is made for "one thousand dollars, on the livery stock, as per application on file, contained in the two-story wooden livery stable, situated in Great Barrington." Here the reference to the "application" makes it a part of the contract. On turning to the "application," in answer to question 10, whether encumbered, &c., and whether insured, the answer is : "No.—There is insurance of \$1,000 on the same property, which please specify in the policy." The answer "no" applies manifestly to that part of the question which inquires respecting encumbrance ; and the residue of the answer, to that part of the question which inquires whether insured or not.

Now here was express notice of an existing fact, in the application which is the basis of the contract ; and this must have precluded The People's Company from setting up such an objection. It appears that they had taken the same view of it, and had paid the loss.

We think the defence well maintained, and that there must be

Judgment for the defendants.

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ASHER HUBBARD vs. RALPH LITTLE, JR., & others.

The demandant, in a writ of entry, who shows a possession prior in time, is entitled to recover against a tenant who shows no title to the premises, but merely possession at the time of suit brought; although such demandant may be a wrongdoer as to the real owner.

THIS was a writ of entry, tried before *Bigelow*, J., in this court, to recover a tract of woodland in Sheffield, in the lower Housatonic Proprietary, containing seven and a half acres, of which the demandant alleged a seisin in fee within twenty years, and a disseisin by the tenants. The writ was dated January 22, 1850.

The demandant, to sustain his title to the premises, offered, in evidence, the will of Noah E. Hubbard, of Sheffield, executed in 1843, and proved and allowed on the 12th of May, 1846, whereby the demandant claimed that the demanded premises were devised to him.

There was no question as to the identity of the demanded premises.

To sustain his case, the demandant called several witnesses, for the purpose of showing acts of possession, use and enjoyment of the premises by said testator, for a period of seventy years; but the details of their testimony are not important to an understanding of the principle upon which the case was finally determined.

The tenants offered no evidence in the case, but contended that the lot in question being wild land, the evidence offered by the demandant did not show such enjoyment or use of the premises as would amount to *legal* possession; and that, upon the testimony offered, the jury would not be authorized to presume a conveyance or grant.

The case was taken from the jury, and the question referred to the whole court, on the evidence reported; the court, to make such conclusions of fact from the evidence as the jury would be authorized to make.

If the court shall be of opinion that the demandant is entitled to recover, judgment is to be rendered for the demandant, and

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the case is to be sent to an assessor to ascertain the damages, unless the parties agree thereon. But if the court shall be of the opinion that the demandant is not entitled to recover, judgment is to be rendered for the tenants.

C. Emerson, for the demandant.

B. Palmer, (with whom was *I. Sumner*.) for the tenants.

BIGELOW, J. Upon the facts stated in the report, it seems to us, that this case falls very clearly within the familiar principle of law, that possession of land is sufficient evidence of seisin to entitle the possessor to hold it against all persons who cannot show an earlier possession, or higher or better evidence of title. A bare possession is sometimes called the first degree of title, and constitutes a valid right to real property, except as against the true owner. 2 Greenl. Cruise, 123, 126. It follows, that a prior naked possession is a sufficient title, against all persons claiming only by a possession subsequently acquired, because, both titles being in their origin of equal validity, that which is prior in point of time must prevail. The demandant, in the present action proved, at the trial, a long-continued possession and occupation of the demanded premises in his ancestor, and a specific devise of them to him. The tenants showed no title in themselves, and no possession of the premises, except that which is admitted by the bringing of the present action. This, in legal effect is nothing more than an admission of possession by the tenants, at the time of suit brought. The elder and better title, therefore, is in the demandant, and he is well entitled to recover.

The force and effect of a mere possessory title, as against a person who ousts the party originally in possession, is fully explained and elucidated in *Slater v. Rawson*, 6 Met. 439. It is there laid down that, if A. enter on the land of B. and oust him, A.'s possession, thus acquired, would constitute legal seisin against any one who might enter upon and oust him without right, and A. might well maintain a writ of entry against the wrongdoer, declaring on his own seisin and a disseisin by the tenant. Actual possession of land gives a good title against a stranger having no title. Nor does this violate the well-established rule, that a party is to recover upon the

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strength of his own title only. A possession, prior in point of time to that of a tenant who has himself no title, but only a subsequent possession acquired by an ouster of the demandant, is a better title, upon the strength of which a party is entitled to recover. It is a case where the maxim, *prior in tempore, potior in jure*, is applicable.

It was not, therefore, necessary for the demandant in the present action to prove a title to the demanded premises, by a disseisin of the true owner, or to raise a presumption of a grant from him. Such proof would be necessary as against a person showing a good paper title to the premises. If, for instance, the Housatonic Proprietary, in whom the title to the estate in question was originally vested, or if any person, claiming by valid conveyance from them, were defendant, it would then be necessary for the demandant to show a title in himself, acquired by disseisin or grant, because, failing to show such title, the Proprietary or their grantee, being the legal owner, would be entitled to hold possession of the premises. But in the present action, the demandant, although a tortfeasor as to the real owner, may, nevertheless, well maintain trespass or a writ of entry against a stranger without title, for a disturbance of his own possession, and such stranger cannot be permitted to show, in defence of such an action, that the demandant's possession was not the possession of the true owner, because a party may have a possession of real estate, which is perfectly legal and valid against one person, and wholly insufficient and invalid against another.

All, therefore, that was requisite on the part of the demandant in this action to prove, as against the tenants who showed no title to the estate in question, was, such a possession and occupation of the premises as to constitute legal seisin against a stranger. The evidence offered at the trial was amply sufficient to prove such seisin, and judgment must be entered for the demandant. *Jackson v. Hazen*, 2 Johns. 22; *Jackson v. Harder*, 4 Johns. 202; *Lund v. Parker*, 3 N. H. 50; *Newhall v. Wheeler*, 7 Mass. 189; *First Parish in Shrewsbury v. Smith*, 14 Pick. 297, 302; *Jackson v. Boston and Worcester Railroad Corporation*, 1 Cush. 575.

Judgment for the demandant

Hollenbeck, Administrator *v.* Berkshire Railroad Company.

**NORMAN HOLLENBECK, Administrator *vs.* THE BERKSHIRE
RAILROAD COMPANY.**

The question, whether an action for injury to the person, under *St.* 1842, *c.* 89, may be maintained by an executor or administrator, depends on the fact whether the testator or intestate lives after the act which constitutes the cause of action, so that a right of action accrues to the person killed, and survives to his personal representative; and the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the person injured.

THIS was an action on the case, brought in this court by the plaintiff, as administrator of Mrs. Hollenbeck, for damage sustained by her, through the negligence of the defendants' agents, by means of which she lost her life. The writ was dated February 8, 1851, and the following facts were admitted, namely : —

That the plaintiff's intestate was, on the 18th day of October, 1850, between five and six o'clock in the afternoon, riding in an open buggy wagon, upon the highway in Great Barrington, at a point where it is crossed by the railroad of the defendants; that she was driving the horse, and was then and there in the exercise of ordinary care; that the horse and wagon then and there came in collision with the cars of the defendants, and the plaintiff's intestate thereby received such injuries, that by reason thereof she subsequently died; that the accident or collision was caused solely by the negligence and want of care and skill of the defendants; that the plaintiff was appointed administrator of the estate of the deceased, February 5, 1851, and that, at the time of the accident, she was a married woman, and the wife of the plaintiff. And if the administrator can maintain an action for the above injuries, all other facts necessary to sustain such action are to be considered as proved, except so far as relates to the time of the death of the intestate, and her mental and physical condition after the injury, which are to be determined by the court from the evidence introduced, from which evidence the court are to draw such inferences, and come to such conclusions of fact, as a jury would be authorized to do. At

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the suggestion of the presiding judge, it is further provided that, if the court deem it a case that they require to be sent to the jury, then all matters of law are to be settled that are presented upon the evidence.

The evidence for the plaintiff was fully set out in the agreed statement, but a report of it here does not seem necessary to an understanding of the principle involved in the case.

If, upon the agreed statement of facts and testimony, the court shall be of opinion that a claim for damages for the injuries received can be maintained by the plaintiff, in this or any other form of action, the defendants are to be defaulted, and judgment rendered for five hundred dollars damages, and costs. If the court shall be of opinion that no such action can be maintained, the plaintiff is to become nonsuit.

G. N. Briggs, for the plaintiff.

1. The plaintiff's intestate survived the injury.

2. Hence the cause of action accrued, and survived to the administrator, and the mental or physical condition of the party injured is not material to the question in this case.

3. The mental and physical condition of the intestate, after the injury, was such, in fact, that it was not impossible for her to have directed the institution of an action after her decease.

F. Chamberlin, (with whom was *W. Porter*.) for the defendants.

Mrs. Hollenbeck could not have instituted or maintained an action after the collision; consequently this action cannot be maintained by the plaintiff as her administrator. *Carpenter's Physiology*, 292, 302, 328, 351, 359, 361; *Baker v. Bolton*, 1 Camp. 493; *Carey v. Berkshire Railroad Co.* 1 Cush. 475; *St.* 1786, c. 81, § 7; *Rev. Sts.* c. 25, § 22; *St.* 1840, c. 80; *Kearney v. The Boston & Worcester R. R. Corporation*, ante 108; *Mann v. Same*, *Ib.*

SHAW, C. J. This is an action on the case, by an administrator, for damage sustained by Mrs. Hollenbeck, the plaintiff's intestate, by the negligence of the engineers, conductors and managers of the defendants, by means of which she lost her life

The question, presented for the consideration of the court, in the present case, is, whether the facts, stated in the report, show a cause of action which accrued to the intestate in her lifetime, and which survived to her administrator, by force of the *St.* 1842, c. 89, § 1.

That statute provides, that the action of trespass on the case, for damage to the person, shall hereafter survive; so that, in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living.

In the two cases cited in the argument — *Kearney v. The Boston & Worcester Railroad Corporation*, and *Mann v. The Same*, ante, 108 — an attempt was made by the court to put a practical construction upon this statute. In doing so, it was necessary to consider what was the law before the statute. It is perfectly well settled, as a rule of the common law, that all rights of action for injury to the person die with the person; and it follows, therefore, that if either the plaintiff or defendant should die before judgment, any existing action, brought to recover such damage, must abate; and if none had been brought by the party injured, none could be commenced by his personal representative. It was the obvious purpose of the statute to reverse this rule of law; to provide that the right of action should survive, as in cases of damage to property, and, of course, be liable to be prosecuted by or against an executor.

The question, in deciding whether any case is within the statute, is, whether the sufferer survived; that is, lived after the act was done which constitutes the cause of action. Life or death, that is the test. If the death was instantaneous, and, of course, simultaneous with the injury, no right of action accrues to the person killed; and, of course, none to which the statute can apply. But if the party survives, lives after it, the right of action accrues to him, as a person *in esse*, and his subsequent death does not defeat it, but, by operation of the statute, vests it in the personal representative.

As in case of inheritance and descent cast, the law con

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templates a *punctum*, or precise moment of time, which separates life from death; and that is the precise time at which the inheritance passes, and vests in the heir. And although it is a fact sometimes difficult to be ascertained by physical indications, and still more difficult to prove satisfactorily by evidence, yet, like other facts of the like kind, upon which important and valuable rights depend, it must be ascertained and proved by the best evidence which the nature of the case will admit.

We think the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer. A right may accrue, by operation of law, to one *in extremis*, when it requires no act, or assent, or even consciousness on his part. Should a person, who is heir to his father, be in the lowest condition, but still heir at the moment of the death of his father, the descent would be cast on him, although he might never know it.

On examination of the evidence, a statement of which in writing is exhibited, it seems placed beyond doubt that Mrs. Hollenbeck lived from fifteen to twenty hours after the accident by which she lost her life; during which time she breathed, swallowed, the blood circulated, and she uttered sounds and manifested signs of life. There is evidence, perhaps not so decisive and satisfactory, that during a considerable part of that time, she manifested intelligence and consciousness, made voluntary motions, and attempted to speak. But, independently of this evidence, we think the evidence conclusive that life remained, and that, within the meaning of the statute, the cause of action accrued to her during her life, and the action may be commenced and maintained by the plaintiff, as her administrator.

Judgment for the plaintiff.

JAMES GIFFORD vs. NATHANIEL WHITCOMB.

In an action to recover back usurious interest paid, the original debtor is a competent witness, under Rev. Sts. c. 35, § 4.

THIS case was tried in the court of common pleas, before *Byington, J.*, who signed the following bill of exceptions:—

“This is an action of debt, to recover back threefold the unlawful interest alleged to have been paid by the plaintiff to the defendant, on promissory notes, given by the plaintiff to the defendant, as set forth in his declaration. The defendant pleaded the general issue.

It was admitted that the defendant was living, and the plaintiff offered himself to become a witness to prove the payment of the unlawful interest. The defendant objected to the admission of him as a witness, but the judge overruled the objection, and he was admitted to testify. A verdict having been returned for the plaintiff, the defendant filed his exceptions.”

T. Robinson, for the defendant.

The plaintiff was not a competent witness. Rev. Sts. c. 35, § 4, which section is to be construed strictly. *Commonwealth v. Knapp*, 9 Pick. 496, 514; *Melody v. Reab*, 4 Mass. 471; 1 Bl. Com. 87.

H. L. Dawes, for the plaintiff, cited, to show the competency of the plaintiff, Rev. Sts. c. 35, § 4; *Little v. Rogers*, 1 Met. 108; *King v. Howard*, 1 Cush. 137.

BIGELOW, J. The objection to the competency of the plaintiff to testify in the present action, is founded on the phraseology of Rev. Sts. c. 35, § 4, by which it is provided that “it shall be lawful for the debtor (the creditor being living) to become a witness, and he shall be admitted as such,” in the trial of any action wherein the fact of unlawful interest having been reserved or taken, is put in issue by the pleadings. The argument is, that the words “debtor” and “creditor,” as used in this section, show that the intent of the legislature was, that this provision, as to the admissibility of parties as

witnesses, was to apply only to those cases where the relation of debtor and creditor actually subsisted between the parties, at the time of trial, which could only be where suit was brought on a contract to which the defence of usury was pleaded, and that it was not applicable where the original debt or contract had been paid, and a suit was brought under § 3 of c. 35 of the revised statutes, to recover back threefold the amount of the unlawful interest reserved or taken, because, in such case, the relation of creditor and debtor had ceased as between the parties to the suit. But we think this would be giving to the language of the statute quite too narrow a construction.

The provision by which parties are rendered competent to testify, extends, in express terms, to the trial of any action, wherein it shall appear by the pleadings that the fact of unlawful interest having been taken or reserved is put in issue. That is the precise issue, in an action brought to recover back usurious interest paid, as it is where usury is pleaded as a defence to the original contract. Besides, in the absence of any clear and express limitation, the general provision regulating the admission of parties as witnesses, in Rev. Sts. c. 35, § 4, must be taken and construed as applicable to the two previous sections, by which the remedies for taking and reserving usurious interest are prescribed. The statute is founded upon the consideration that, from the nature of the case, only the original parties to the usurious contract would be cognizant of the facts necessary to establish it by proof, and they were, therefore, rendered competent witnesses *ex necessitate rei*. This reason applies with equal force to actions brought to recover back illegal interest paid, as to suits in which usury is pleaded in defence to the original contract.

The words "debtor" and "creditor," as used in the above cited section of the revised statutes, have uniformly been incorporated in the several acts relating to usury, which have been in force in this commonwealth, and have long since received a judicial interpretation. They are intended as a *designatio personarum* merely, and not as indicating a present existing relation between the parties. They are meant to

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signify the parties to the original contract alleged to be usurious, or "the original debtor and creditor." *Binney v. Merchant*, 6 Mass. 190; *Little v. Rogers*, 1 Met. 108; *King v. Howard*, 1 Cush. 137; *Bacon v. Robinson*, 7 Cush. 579.

Exceptions overruled.

DEXTER GLEASON vs. JOHN SMITH & others.

A. contracted under seal, to build a dam, according to the specifications and in the manner set forth in the contract, the last instalment of the price to be paid when the dam should be completed according to the contract. A., acting in good faith, and with an honest intention of fulfilling the contract, built a dam, though not according to the contract; it was held that he might maintain an action for work done and materials furnished, and that the jury should deduct from the contract price, so much as the dam built was worth less than the dam contracted for.

THIS was an action of debt, brought in the court of common pleas, upon a sealed instrument, being a contract entered into by the plaintiff with the defendants to build for them a dam, according to the specifications and in the manner in the contract contained. There was also a second count in the writ, upon a *quantum meruit* and *quantum valebant*, for the work done and materials furnished in building the dam. The action was brought to recover the last instalment under the contract, and also for the amount of certain extra labor claimed to have been performed.

There was evidence that the plaintiff, although he built a dam, had failed to fulfil the contract, and the plaintiff contended that, though the jury should find that he had not fulfilled his contract, yet if he had built a dam, and acted in good faith, and with an honest intention of fulfilling the contract, though he had failed so to do, he could nevertheless recover, under his second count, what the jury should find the labor and materials to be worth to the defendants. The defendants contended, and requested the judge so to instruct the jury, that by the express stipulations of the contract, the last instalment was to

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be withheld until the dam was built according to the contract, and that, therefore, if the jury should find that the dam had not been completed according to the contract, the plaintiff could not recover any part of such instalment under either count in this action. But the presiding judge, *Byington, J.*, declined so to instruct the jury, and instructed them that, notwithstanding the stipulations of the contract, the plaintiff, though he had not fulfilled the same, could nevertheless recover, under the second count in his writ, for the work and materials done and furnished, if he acted in good faith, and intended, though failing, to fulfil the same, so much as his work and labor, and materials were worth to the defendants; and they should deduct from the contract price so much as the dam built by him was worth less than the dam contracted for. The jury having found a verdict for the plaintiff, the defendants alleged exceptions.

H. L. Dawes, for the defendants.

1. The fulfilment of the contract was a condition precedent to the payment of any portion of the last instalment. *Milner v. Field*, 1 Eng. Law & Eq. R. 531; *Chitty on Con.* 497, 498; *Sinclair v. Bowles*, 9 B. & C. 92; *Stark v. Parker*, 2 Pick. 267; *Moses v. Stevens*, 2 Pick. 332.

2. The jury should have been instructed that they must be satisfied from the whole evidence, that the defendants had acquiesced in deviations from the contract, before the plaintiff could recover on a *quantum meruit*. 2 *Smith's Leading Cases*, note to *Cutter v. Powell*; *Olmstead v. Beale*, 19 Pick. 528; *Snow v. Ware*, 13 Met. 42.

3. The jury should have been instructed that, if no assent of the defendants to the deviations from the contract were found, and the work was affixed to the realty so that it could not be removed, but must be enjoyed by the defendants, then the rule of damage should be, the contract price, minus what it would cost to make the work conform to the contract. *Chitty on Con.* 497; *Thornton v. Place*, 1 M. & Rob. 218 *S. C.* 2 *Smith's Lead. Cas.* 17.

S. W. Bowerman, for the plaintiff.

DEWEY, J. This case does not differ from the cases that have been so frequently before the court, in which it has been held, that a strict literal fulfilment of a building contract was not a condition precedent to a recovery upon the contract. In terms, the last payment was to be made when the work was completed, but that does not take the case out of the rule, and where the party has acted in good faith, and has unintentionally failed, in some particulars, to perform the contract, he may yet recover for his services, deducting therefrom such sums as will fully indemnify the other party for any deficiency in the work. The only question in this case, as it seems to us, is, as to the proper rule for assessing damages.

It is not that the jury are to give what the building is worth to the owner, for that would be to disregard the contract. The rule, as stated in our earliest reported case on this subject, was in terms like those stated by the presiding judge upon the trial of this case. The first position stated by the court, that the plaintiff was to recover of the defendants so much as the work and labor were worth to the defendants, would have been erroneous if standing alone, but it was qualified by the mode in which the jury were directed to arrive at that result, namely, by deducting from the contract price so much as the dam built by him was worth less than the dam contracted for.

The rule for making the deduction from the contract price, for the deficiency in the work, has been sometimes stated in another form, that the jury would take, as the basis of the calculation, the contract price, and deduct from that sum such an amount as would be required to be paid to complete the work according to the contract, as was done in *Snow v. Ware*, 13 Met. 42, and *Smith v. First Congregational Meeting House in Lowell*, 8 Pick. 178.

Probably the result would be much the same under either of these rules. In many cases the latter rule would not be adapted to the case, as where the building was wholly finished, but there was some small departure from the contract in some of the details; there the rule must be to deduct so

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much from the contract price as the work was worth less to the owner.

On the other hand, where the omission was in a failure to complete the work, and such defect was capable of being supplied by additional expenditure of labor or materials, the proper rule would seem to be, to deduct such sum as would cover all future expenses necessary to complete the work according to the contract. What these deficiencies from the contract were in the present case, does not distinctly appear in the bill of exceptions.

So far as the case is stated, the ruling, in the form it was given, is not open to the exceptions taken.

Judgment on the verdict.

TRUMAN ESTES vs. RODMAN H. WELLS & others.

A. conveyed by deed to B., "a privilege to make a ditch from the north side of the north branch of the Hoosac River, and taking the water from the river for a factory below, to be taken out a buttonwood tree six and one half rods easterly of said A.'s west line and the east line of land owned by said B., then north $57\frac{1}{2}^{\circ}$ west, to the west line of said A.'s lot, the ditch to be fourteen feet wide; with a privilege of building a dam across the river to take the water into said ditch, the dam not to be raised so high as to raise the dead water below the mouth of said A.'s ditch and above said B.'s dam at low-water mark:" held, that the grantee acquired no right thereby to flow the land of the grantor without payment of damages.

'THIS was a complaint for flowage, brought in the court of common pleas. The parties admit that the complainant is the owner of the land described in the complaint, and that the respondents flow the same, as alleged therein. The respondents claim the right to flow the same without compensation, by virtue of a deed from David Estes to Edward Richmond, dated June 4, 1836, which conveyed "a privilege to make a ditch from the north side of the north branch of the Hoosac River, and taking the water from the river for a fac-

tory below, to be taken out [at] a buttonwood tree six and one half rods easterly of said David's west line and the east line of land owned by said Richmond, then north $57\frac{1}{2}^{\circ}$ west, to the west line of said Estes's lot; the ditch to be fourteen feet wide, with a privilege of building a dam across the river to take the water into said ditch, the dam not to be raised so high as to raise the dead water below the mouth of the said Estes's ditch and above said Richmond's dam, at low-water mark; with a privilege to repair and rebuild said ditch and dam, and a passage way to the road by said Estes's mill."

The respondents have become the owners of all the rights acquired by Richmond under the above deed. The complainant derived his title to the land described in the complaint from the same David Estes, by a deed dated August 18, 1842.

The respondents contended that the deed of David Estes to Richmond gave them the right to flow the land described in the complaint, provided they did not raise the water on such land higher than the level of the dam which they had a right to maintain under the deed. The complainant contended that the deed of David Estes to Richmond gave the respondents no right at all to flow the land described in the complaint, without compensation; and the complainant further contended, which the respondents denied, that the respondents had flowed the land to a level higher than the dam which they had a right to maintain under the deed from David Estes to Richmond.

The presiding judge, *Mellen, J.*, being of the opinion that the respondents did not, by virtue of the deed of David Estes to Richmond, acquire the right to flow the land described in the complaint without compensation, gave judgment for the complainant, and the respondents excepted to the ruling.

L. C. Thayer, for the respondents.

The deed of David Estes to Richmond gives to the respondents the right to flow the land described in the complaint, without compensation. Angell on Watercourses, (4th ed.) § 353, *et seq.*; *Pettee v. Hawes*, 13 Pick. 323; *Chamberlain v. Crane*, 1 N. H. 64; *Jackson v. Vermilyea*, 6 Cowen, 677; Broom's Legal Maxims, 200, and note *y*.

H. L. Dawes, for the complainant.

1. The deed of David Estes to Richmond gives the respondents no right to flow the land described, without compensation. Broom's Legal Maxims, 201, 278, and cases cited in note A; *Miller v. Bristol*, 12 Pick. 550, 553.

2. The respondents have no right to flow the lands described in the complaint, with the waters of the "North Branch," either with or without compensation. Rev. Sta. c. 116; *Fiske v. Framingham Manufacturing Co.* 12 Pick. 68.

BY THE COURT. This is a complaint for flowing lands of the complainant, by the respondents' dam, under the mill acts, and the single question is, whether the respondents have acquired a right to flow as they do, without payment of damages. The case comes before this court by exceptions, and presents a question upon the construction of a deed from David Estes, the plaintiff's predecessor, to Edward Richmond, under whom the respondents claim title.

The court are of opinion that this deed gives the respondents no right to flow Estes's land, without claim for damages. Perhaps it might be held that it gives no right to flow Estes's land at all, and that, by means of an artificial canal, he has no right to do so, without a grant; but this neither party claims. The only question here is, whether it gives a right to flow without damage.

It is true that a grant is to be construed favorably for the grantee, and it shall carry with it, as far as the grantor has the power to grant, the rights necessarily incident to its enjoyment. We say *necessarily incident*; but such construction is not to carry it beyond the terms of the grant. This is a grant to conduct the waters in a ditch from the river to the factory. It would be to make a new grant, to construe this as a right to make a reservoir beyond the fourteen feet ditch, on the grantor's land.

Exceptions overruled, judgment of the court of common pleas affirmed, and case remitted to the court of common pleas for further proceedings.

EZRA W. JACKSON vs. ELIJAH PIXLEY.

A defendant in an action of trover, who has induced the plaintiff to believe when demanding the property that it was in his possession and control, is not thereby estopped in law from proving the contrary.

THIS was an action of trover, brought in the court of common pleas, to recover the value of a pair of horses claimed by the plaintiff, and alleged to have been converted by the defendant to his own use. The defendant pleaded the general issue, and filed a specification of defence, that he never owned the horses, and never had the control or possession of them, but that they belonged to one John Pixley, a son of the defendant.

The plaintiff offered evidence that the horses were his, and that he had the right of possession at the time of the alleged conversion. To prove the conversion by the defendant, the plaintiff introduced evidence, by one Edward Day, that, prior to the date of the writ, the plaintiff, hearing that the defendant had the horses, went to the house of the defendant, and, in the presence of Day, asked the defendant if he had the horses, and if he had got them of a man from Otis, and the defendant replied that he had the horses in his barn, and that he had them of a man in Otis. The plaintiff then told him that he claimed the horses as his property, and asked the defendant to deliver them up to him. Whereupon the defendant said he had bought the horses and paid for them, and no man could have them. The plaintiff then told the defendant he should sue him, unless he delivered the horses to him, but the defendant refused, and the plaintiff was about leaving, when the defendant said he did not want a lawsuit, and if the plaintiff would wait a day or two, he, the defendant, would see the man in Otis about the matter, after which this suit was brought.

The defendant introduced the testimony of his son, John Pixley, and others, that John bought the horses of a man in Otis, with his own property, and that, at the time of the

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plaintiff's demand, they were the property, and in the control and possession of John, and kept by him at his father's barn, and not the property nor in the possession of the defendant. There was testimony that John was then only nineteen years of age, and that the horses were in the barn of the defendant, occupied and possessed by the defendant, and that John was then living with his father.

On the above evidence, the plaintiff requested the presiding judge, *Byington*, J., to instruct the jury, as matter of law, that, if the defendant was in any way apparently concerned in the detention, when applied to for the restoration of the horses, and by his answer induced the plaintiff to believe that he had the possession and power to deliver them up, and refused to do so, and the plaintiff was thereby induced to sue him, he could not defend, on the trial, on the ground that he had not, when applied to, the control and disposition of the horses. The judge refused so to instruct the jury, but instructed them that this would not in law estop the defendant from showing that he was not in fact concerned in their detention, and had not the control and possession of the horses at the time of the demand, but was evidence for their consideration, and for their determination how far conclusive to show he was concerned in their detention and had the possession and control of them, and, if satisfied he had control and possession of them, and, on demand made, he refused to deliver them, the plaintiff might maintain his action against him; but if, upon the whole evidence, they were satisfied he did not purchase them, and had not the possession and control of them, the plaintiff could not recover, though the plaintiff was induced by the defendant's answers to believe he had possession, and that it was in his power to deliver them to him, and so sued the defendant.

A verdict was rendered for the defendant, and the plaintiff filed his exceptions.

M. Wilcox, for the plaintiff.

The defendant, by his own declarations, admissions and conduct, induced the plaintiff to believe that the defendant had possession and control of the horses, and was thereby

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estopped to deny the facts which he had induced the plaintiff to believe, and upon which the plaintiff had acted. 3 Stephens's Nisi Prius, 2686; *Hall v. White*, 3 C. & P. 136; Cowen & Hill's Notes to Phillipps on Ev. vol. 2, pt. 1, 205, 206, and authorities there cited; *Price v. Harwood*, 3 Camp. 108; *Platt v. Squire*, 12 Met. 494; *First Presbyterian Congregation in Salem v. Williams*, 9 Wend. 147.

I. Sumner, for the defendant.

BY THE COURT. The question of conversion was a question of fact for the jury, and as such it was left to them on the evidence. The fact that the defendant said, in the first instance, that the horses were his, and that he bought them and had the possession and control of them, was strong evidence against him, but it was not conclusive; and the court could not, therefore, charge as matter of law, that it was.

Exceptions overruled



**'THE COLD SPRING IRON WORKS vs. THE INHABITANTS OF
TOLLAND.**

Under a statute by which a stream not navigable is made the boundary of an incorporated territory, the centre of the stream, and not the edge or margin, is the true boundary line; and this is so although the monuments are described as standing on the margin or bank of the stream.

THIS was an action on the case, to recover damages to the plaintiffs' property, by an alleged defect of a bridge across the Farmington River, and was submitted to the court of common pleas, and, by appeal, to this court, upon the following agreed statement of facts:—

The accident occurred on the east half of the bridge. The defendants deny that any portion of the bridge is situated within the limits of the town of Tolland, and allege that the east bank of the river forms the west boundary of the town, and the parties propose to submit the question of boundary to the court. If no part of the bridge is within the town of Tolland, the plaintiffs are to be nonsuit; if otherwise, the

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case is to stand for trial in court or before referees, to be agreed on by the parties or appointed by the court.

Tolland was incorporated in 1810, and formerly composed the west parish of Granville, which parish was incorporated in 1785. Granville was incorporated in 1754. The bounds mentioned in the act commence at the southeast corner of Granville, and run thence up the east side of that town, and along the north side, to the southwest corner of Blandford. The description then proceeds as follows: "Thence the same course 660 perches to a hemlock tree marked, with stones about it, on the west branch of Farmington River, and is the northwest corner of said tract; from thence bounding on said west branch of Farmington River, as the same runs, to a great hemlock tree at the colony line, being the southwest corner of said tract; from thence on said colony line east nine degrees, 3320 perches to the first station."

The "hemlock tree" at the northwest, and the "great hemlock tree" at the southwest corner of Granville, stand on the east side of the river.

Opposite the part of Tolland where the bridge is built, is that part of Sandisfield formerly incorporated as Southfield, and the annexation of the two towns of Sandisfield and Southfield was in 1820.

The road on which the bridge is built was the 10th Massachusetts turnpike.

The town of Tolland never built or repaired any portion of the bridge.

All acts and resolutions and proceedings of the legislature of Massachusetts, relating to the boundary of the counties of Berkshire or Hampden, or to those of the border towns of those counties, and all maps and allotments and surveys of land which properly affect the boundaries of those towns may be referred to.

These facts are agreed to only so far as they affect the boundaries of the above-named towns, and are not to affect the subsequent trial of the case.

The presiding judge of the court of common pleas having ruled that, upon these facts, the bridge was not situated

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within the town of Tolland, and that the defendants were not liable, the plaintiffs appealed to this court.

M. Wilcox, for the plaintiffs.

The west line of Tolland is the centre or thread of the river. *King v. King*, 7 Mass. 496; *Lunt v. Holland*, 14 Mass. 149; *Inhabitants of Ipswich, petitioners*, 13 Pick. 431; *Mayo v. Quimby*, 3 Dane's Abr. 4; *Harramond v. M'Glaughon*, 1 Taylor, (N. C.) 136, cited in Angell on Watercourses, (4th ed.) § 37; *Lowell v. Robinson*, 4 Shepley, 357; *The State v. Gilmanton*, 9 N. H. 461; *Noble v. Cunningham*, 1 McMullan, Eq. R. 289; *Warner v. Southworth*, 6 Conn. 471; *Luce v. Carley*, 24 Wend. 451; *Child v. Starr*, 4 Hill, 369.

W. G. Bates, for the defendants.

1. The liability of the defendants depends upon the construction of the act of 1754, incorporating Granville. 1 Special Laws, 97; 4 Ibid. 299.

2. Though there is an analogy in the construction of an act or a resolve and a deed or a contract, yet that analogy is not strict, and different rules may well be applied. In the first case, reference is had mainly to questions of jurisdiction, and it may be an object that the lines of a municipality should be on the shore of a stream instead of in the thread, for the purpose of avoiding the difficulties arising in the erection of bridges by adjacent towns, or in apportioning the damages sustained by reason of defects in such bridges. In the latter case, regard is had to agricultural and manufacturing purposes, and the interests of conterminous proprietors.

3. In the construction of a grant, doubtful words are to be taken most strongly against the grantor, but in case of an act no such implication is raised.

4. In the construction both of a deed and an act, the evident intention is to govern, and the reasons and circumstances existing at the time, and the conduct of the parties at and subsequent thereto, will explain any otherwise ambiguous expression. *Hatch v. Dwight*, 17 Mass. 289, 295, 299; *Rix v. Johnson*, 5 N. H. 520; Angell on Watercourses, (4th ed.) §§ 10-40.

5. The language of the act limits the west line of Tol-

land to the east bank of the river; both monuments stand there, and both are declared to be corners. The expression, "thence bounding on said west branch, as the same runs, to a great hemlock tree at the colony line, being the southwest corner of said tract," is equivalent to expressions used in conveyancing, "thence bounding on land of A. B., to a stake," &c., meaning to follow the outer line of his land, or, in this case, the shore of the stream, or the edge of the water.

6. The line has been understood so to run, Tolland never having built or repaired the bridge.

7. The language of the grant, as compared with other acts, favors the defendants. 1 Special Laws, 97; 2 Ibid. 393; Ibid. 166; 5 Ibid. 280.

METCALF, J. The single question in this case is, whether the *eastern bank* or the *centre* of the west branch of Farmington River is the western boundary of the town of Tolland. And this depends on the construction and effect of the statute of 1754, incorporating the town of Granville. By that statute, the north line of the incorporated tract ran "to a hemlock tree marked, with stones about it, on the west branch of Farmington River," which was declared to be "the northwest corner of said tract." From this corner, the west line of said tract ran southerly, "bounding on said west branch of Farmington River, as the same runs, to a great hemlock tree at the colony line, being the southwest corner of said tract." By St. 1784, c. 74, the town of Granville was divided into three parishes; and the western line of the west parish was the western line of the town. By St. 1810, c. 14, the west parish, as known by its then existing bounds, was incorporated as a town, by the name of Tolland. The western boundary line of Granville, as established by St. 1754, is therefore the present western boundary line of Tolland. And, in our opinion, that line is the centre or thread of the river.

A grant of land, bounded on a stream not navigable, carries the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin. Angell on

Watercourses, (4th ed.) §§ 11, 23; 3 Kent Com. (7th ed.) 516. And this is so, although the monuments are described as standing on the margin or bank of the stream. By Walworth, Chancellor, 4 Hill, 375; *Covert v. O'Conner*, 8 Watts, 470; *Lowell v. Robinson*, 4 Shepley, 357; *Lunt v. Holland*, 14 Mass. 149; *Knight v. Wilder*, 2 Cush. 199. The case of *Luce v. Carley*, 24 Wend. 451, cannot be distinguished from this. In that case, the granted premises were described by a line running to a hemlock stake, "standing on the east bank of the river; from thence down the river, as it winds and turns, 24 chains and 94 links, to a hard maple tree," &c. It was held that the grantee took to the centre of the river. "It is never thought," said the court, "that monuments, mentioned in such a deed as occupying the bank of the river, are meant by the parties to stand on the precise water line, at its high or low mark. They are used rather to fix the *termini* of the line which is described as following the sinuosities of the stream, leaving the law to say whether the one half of the river shall be included. Where the grant is so framed as to touch the waters of the river, and the parties do not expressly except the river, one half the bed of the river is included by construction of law. If the parties mean to exclude it, they should do so by express exception." So in *Noble v. Cunningham*, 1 McMullan Eq. Rep. 289, it was held that no intention to exclude the bed of an unnavigable watercourse can be inferred from the fact that the corners of the granted land, as described in the grant, are marked trees growing on the bank. The court said, "the corners were marked on the bank, of necessity. No corners could be put in the river. The river is laid down as an open line from corner to corner, which in fact makes it a boundary, and carries the line to the thread of the stream, or centre of the boundary."

The same construction that is given to grants is given to statutes which prescribe the boundaries of incorporated territories. *Inhabitants of Ipswich, petitioners*, 13 Pick. 431.

According to the agreement of the parties, the case is to stand for trial.

JONAS STEARNS vs. JOHN G. HENDERSASS.

An adverse and exclusive possession of land for a period of twenty years is a good bar to a writ of entry to recover the same, although the demandant's title may have been derived through mesne conveyances from the tenant; nor is the tenant estopped, by his covenants of warranty in the deed to his original grantee, from setting up a subsequent title acquired by disseisin.

In an action for the recovery of land, the defence to which is an adverse and exclusive possession for a period sufficient to constitute a bar under the statutes of this commonwealth, the declarations of a grantee of the premises, made more than twenty years before the commencement of the action, and subsequently to the date of his deed, that the entire title of the premises, at the time of such declarations, was in the tenant in such action, are competent evidence, as bearing upon the question of adverse possession in the tenant under a claim of right; but the declarations of such grantee, made after his insolvency and the conveyance of his interest in the premises to an assignee, and after twenty years' adverse possession by the tenant, are inadmissible.

THIS was a writ of entry, wherein Jonas Stearns demands of John G. Hendersass certain lands situated in Williams-town in this county. The demandant counting on his lawful seisin in fee within twenty years, and disseisin by Hendersass. The action was tried in this court before *Cushing, J.*, who reported it as follows:—

The demandant claimed to derive title through the following conveyances, namely: 1. A deed of the demanded premises from Hendersass, the tenant, to one Harvey Blake, in the common form of warranty, duly executed and acknowledged on the 21st day of April, 1826, and recorded on the 14th of October, 1843; 2. An assignment by Franklin O. Sayles, Esquire, a master in chancery in and for this county, to James T. Robinson, as assignee of Harvey Blake, insolvent debtor, of the property of Blake, made on the 20th day of March, 1848, and duly recorded; 3. A deed of the premises from Robinson to the demandant, dated December 20, 1849, and duly recorded.

The tenant proposed to introduce evidence to the following effect, namely:—

1. That the tenant Hendersass had remained in the actual possession and sole occupation of the premises, from the time

of the execution of his deed of the 21st of April, 1826, to the present time.

2. That the possession of Hendersass, during that period, was an adverse one, of such exclusive character, and with such notorious claim of right, as to have revested the title in Hendersass, as against Blake.

3. That, at the time of the conveyance from the master in chancery to Robinson, and from Robinson to the demandant, there was a subsisting disseisin of Blake by Hendersass.

To this evidence the demandant objected, on the assumption that a grantor cannot by law acquire title by possession, as against his grantee; but I was of opinion that it might be possible in law for such facts to exist, of continuous adverse possession and notorious claim of right, on the part of a grantor, for the period of twenty years, as to constitute a legal ouster and disseisin of the grantee, and revest the title in the grantor; and I therefore permitted the tenant to introduce the proposed evidence. To which ruling the demandant objected.

To rebut this evidence of the tenant, the demandant, in the first place, offered evidence of an alleged *pro forma* entry by Robinson on the premises, on the 20th day of December, 1849, the date of his deed to Stearns, and a livery of seisin of the premises by words to Stearns; but without any ouster of Hendersass, who still remained in possession, and who was not present at the time of such nominal entry and livery of seisin. I admitted this evidence, but ruled that such *pro forma* entry by Robinson, without actual ouster of Hendersass, even if of any effect whatever under the general facts of the case, (which was doubtful,) yet was, at any rate, of no avail, if there was, at the time of the assignment by the master in chancery, a subsisting disseisin of Blake by Hendersass, and had been for the period of twenty years. To which ruling the demandant excepted.

The demandant then offered the deposition of Harvey Blake, made the 28th day of August, 1852, as counter evidence on the question of possession. I admitted such parts of the deposition as appeared to me lawful, but ruled upon it,

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among other things, that it was not competent for the demandant to prove or introduce the declarations of Blake, made after his insolvency, and the expiration of the alleged twenty years adverse possession by Hendersass. To this ruling the demandant excepted.

Evidence was introduced by the tenant and submitted to the jury, impeaching the credibility of Blake.

Among the facts offered in proof by the tenant, were sundry declarations of Blake, made in June, 1826, to the effect that the entire title of the premises, at the time of the declarations, was in Hendersass, and expressly disavowing any title in himself. This evidence I ruled to be competent, to which ruling the demandant excepted.

I instructed the jury as follows, namely : —

1. The chain of conveyances, from Hendersass to Blake, and from Sayles, through Robinson, to the demandant Stearns, constitutes a good *prima facie* title in the demandant; but as the demandant must prevail, if at all, on the strength of his own title, it is competent for the tenant to show, if he can, a defect of title, or of right to convey, somewhere, in the series of conveyances, and subsequent to the execution and delivery of his own deed.

2. The master in chancery could assign to Robinson the estate of Blake, whatever it was, and no more.

3. As between Hendersass and Blake, or any persons claiming under Blake, the deed of Hendersass, upon the evidence in the case, and for the purposes of the trial, is to be taken as, at the time of its execution, vesting the title in Blake.

4. That, if the tenant proposes to disprove the present title of Blake, or those claiming under him, and to disprove it by proof of disseisin and adverse possession for twenty years, then the law applicable to this part of the case is as follows, namely : —

1. The deed of a disseisee, the disseisin still subsisting is inoperative to convey title.

2. To constitute a disseisin, actual force is not necessary; but continuous, open, and exclusive possession, accompanied with acts of ownership manifesting the intention to hold the

whole estate, and adverse to the true owner, is sufficient. Yet, an ouster or disseisin is not to be presumed from the mere fact of sole possession, although it may be proved by such possession, accompanied with a notorious claim of exclusive right.

In this view of the law, I submitted the case to the jury, directing them to pass upon the facts proved, and, if they should be satisfied, on consideration of the whole of the evidence, that it established such disseisin of Blake by Hendersass as above defined, and such adverse possession of the premises by the latter for twenty years, with notorious claim of exclusive right on his part, then to find a verdict for the tenant; but otherwise, for the demandant.

The jury found a verdict for the tenant.

If the court are of opinion that any of these rulings or instructions were wrong, the verdict is to be set aside and a new trial granted; if not, judgment is to be entered on the verdict.

J. T. Robinson, (with whom was *T. Robinson*), for the demandant.

A grantor cannot set up, against his warranty deed to the grantee, a subsequently acquired title by possession; 1, because it would be impeaching and overthrowing his own deed, which he is estopped from doing; 2, because the law of estoppel and rebutter, to avoid circuitry of actions, interposes and rebuts and bars his right. *Wade v. Lindsey*, 6 Met. 407; *Lamb v. Clark*, 5 Pick. 193; *Somes v. Skinner*, 3 Pick. 52, 61.

A title by possession does not necessarily rest upon a presumption of a grant. Stearns on Real Actions, 238.

The admission of the declarations of Blake, the grantee, was improper: 1, because it is evidence offered by the grantor tending to invalidate his own deed; 2, because it is in violation of the rule which excludes parol evidence to affect written instruments.

The declarations of Blake were irrelevant.

W. Porter, for the tenant, cited Rev. Sts. c. 119, § 1; *Parker v. Proprietors of Locks and Canals*, 3 Met. 91; *Sumner v.*

Stearns, 6 Met. 337; *Church in Brattle Square v. Bullard*, 2 Met. 363.

DEWEY, J. The demandant derives title under a conveyance from the tenant, of date of April 2, 1826, to Harvey Blake, and a conveyance by the assignee of the grantee, Blake, who was authorized to convey all his right and title in the demanded premises.

The documentary evidence establishes a good title in Blake, the insolvent, in April, 1826, and the further question is, whether such title has been defeated or lost.

The tenant, in his defence, relies upon a subsequent title acquired by disseisin. To sustain this, he shows those acts of open, notorious, exclusive, adverse possession, for a period more than twenty years, which would be amply sufficient, in ordinary cases, to establish such adverse possession as, under our statutes, would bar a writ of entry to recover the same.

It is then insisted by the demandant, that, from the peculiar relation in which the tenant stands as to this title, he cannot set up the defence of an adverse possession, to defeat the same. In other words, that, having been the grantor of the premises to Blake, in 1826, he is estopped from denying the title of Blake or those claiming under him.

The first error of this position or ground of estoppel is, that it assumes what is not in fact true. The proposed defence does not impeach the deed to Blake. It admits its full force and effect as a valid deed. It concedes that, at its date, a good title passed to the grantee by virtue of it. The whole foundation of the defence rests upon an after-acquired title by the tenant, or subsequent acts, divesting the grantee of his interest in the premises. Full effect is given to the deed of the tenant to Blake, when it is held to vest the absolute title in Blake at its delivery, and that it estops the tenant from setting up any other title as then held adversely. The grantor, in such case, may show a subsequently acquired title from his grantee, and it is no answer to an alleged disseisin, or a bar by more than twenty years adverse possession, that the disseisor, previous to his entry and the commencement of his adverse possession, fully acknowledged the title of the disseisee. Such

was the case of *Sumner v. Stevens*, 6 Met. 337; *Barker v. Salmon*, 2 Met. 32.

All that is necessary to be shown is an adverse and exclusive possession of twenty years, and this being shown, constitutes a good defence to the action. The act, in such a case as the present, must be clear and unequivocal, as a possession claiming title adverse to the true owner, but if shown, it is a good bar to an action by him who has only a good paper title.

Secondly, it is urged that the covenants of warranty in the deed of the tenant to Blake, estop him from setting up this defence, and that they may be relied on as a *rebutter*, to avoid circuitry of action.

The principle of *rebutter* is one of frequent application, and, in proper cases, is to be allowed as a good bar.

Thus if A. by his deed conveys to B. land, with covenants of warranty, not having in fact the title, but subsequently acquires the title, such subsequently acquired title enures to the benefit of B., the grantee, by reason of the covenants of warranty of A.

But it will readily be perceived that the foundation of this rule rests upon the fact that the party thus conveying with warranty had not the title he professed to convey, and was liable therefor on his warranty. But such was not the case here. It was a good title that was conveyed, and there was no breach of any covenant, and, of course, no ground for estoppel against the tenant by reason of his covenant with warranty.

2. As to the objection to the admission of the declarations of Blake, in June, 1826, that they were inadmissible because they tend to invalidate the deed under which he then held, and for the further reason, that their admission is in violation of the rule which excludes parol testimony offered to contradict written documents, these grounds are, in the opinion of the court, untenable. The declarations of Blake, offered in evidence, apply to a period after the making of the deed to him. The title may have been in him at the date of the deed, and yet it may be true that, at the date of these admissions,

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three months after, he had relinquished all claim, and yielded to the tenant, disavowing any title in himself. It was certainly competent evidence as bearing upon the question of adverse possession in the tenant, under a claim of right. It tended to establish such adverse possession with the knowledge of Blake, and to show his acquiescence in such adverse claim.

3. The further ruling of the court, excluding the declarations of Blake, after twenty years adverse possession, and after he had become the subject of proceedings in insolvency, and his interest passed to an assignee, was also correct.

The result is, that all the exceptions are overruled.

Judgment for the tenant.

JOSHUA SHAW, JR. vs. JOHN MILLS.

KENDALL BAIRD vs. SAME.

If the verdict of a sheriff's jury, in a complaint for flowage, follows the statute substantially, though not verbally, it is a sufficient compliance with the terms of the law.

THESE were complaints for flowing the same land. The verdicts of the sheriff's jury, which were returned to the court of common pleas, to be there allowed and recorded, set forth only the amount of damages sustained, respectively, by the complainants, within three years next preceding the institution of the complaints; the amount of their annual damages; and what sum in gross would be a just and reasonable compensation for all the damages to be thereafter occasioned by the use, and for the right of maintaining and using the same forever, in the manner set forth in the verdict. The respondent objected to the allowance and recording of the verdicts, because the allegations in the complaints, "that the dam is raised to an unreasonable height, and that it ought not to be kept up and closed during the whole year," are not passed upon and decided by the jury, and no decision by them, touch-

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ing said allegations, is stated in the verdicts. The court of common pleas overruled the objections, and accepted the verdicts. The respondent thereupon appealed to this court.

M. Wilcox, for the respondent.

G. J. Tucker, (with whom was *W. Porter*), for the complainants.

By THE COURT. Let the verdicts be allowed and recorded.

AUSTIN L. SCOTT vs. SAMUEL SHEARS 2d.

In a suit against one, proof may be given of a debt due from him and another jointly.

THIS was an action of assumpsit, brought by the plaintiff in the court of common pleas, to recover of the defendant the value of work and labor done and performed by the plaintiff for the defendant, as stated in the plaintiff's bill of particulars. The case was referred to an auditor.

At the hearing before the auditor, the plaintiff offered his book with his oath, to support his bill of particulars. Upon inspection of the book, it appeared that the charges which the plaintiff proposed to prove in support of his bill of particulars, were there charged against Samuel Shears 2d, the defendant, and Charles Graves, jointly; and, therefore, the defendant objected to the introduction of that evidence, as not being competent in any particular to support the plaintiff's bill of particulars; and the auditor, being of that opinion, rejected the evidence, but submitted the matter to the court. The auditor found that, if his ruling was right, the plaintiff could not recover; but if the evidence was competent, and should have been received, then the plaintiff would be entitled to recover the balance charged in his bill of particulars, namely, \$83.20.

At the trial, the presiding judge, *Byington*, J., ruled that

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the evidence was competent, and should have been received. Thereupon, the defendant submitted to a default, and judgment was entered for the plaintiff upon the auditor's report; and the defendant brought the case to this court by exceptions.

B. Palmer, for the defendant.

Neither the writ, nor bill of particulars, nor any thing in the case, gave any notice that the plaintiff was seeking to recover for work done for the defendant and Graves. Therefore the defendant could not plead the non-joinder of Graves, as he had no knowledge that that was the claim sued until the evidence was offered before the auditor. In all the cases cited by the plaintiff, showing that the defendant's only remedy was by a plea in abatement, it clearly appears that the action was brought to recover a joint claim against the defendant and others.

J. M. Wolcott, for the plaintiff, cited *Wilson v. Nevers*, 20 Pick. 20; Rev. Sts. c. 100, §§ 1, 21; *Rice v. Shute*, 5 Burr. 2611; 1 Chitty Pl. 52.

By THE COURT. The only question of law in this case is, whether, in a suit against one, proof may be given of a debt due to the plaintiff from him and another jointly. Of this there is no doubt. A debt due from two is due from each *in solido*, and each is liable for it, and each is presumed in law to know it. If the other joint debtor is living, not discharged in insolvency or otherwise, and within reach of process, the defendant should have pleaded the non-joinder in abatement. If the defendant was actually surprised by the proof of a joint debt, he should have asked for time. *Exceptions overruled.*

WILLARD MOODY vs. HENRY L. SABIN.

Where exceptions are taken to the admission of evidence, on the ground that it is irrelevant, if there be any one point, consistent with the facts in the bill of exceptions, to which it is applicable, the exceptions will be overruled.

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In an action against a surgeon, for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double inclined plane, at an angle of 45 degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff, by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double inclined plane of any angle, by means of a screw. The evidence was admitted, and, on exceptions, the court held that, both as *res gestas* and as a statement made in presence of the party, they could not say that it was erroneously admitted.

THIS was an action on the case, brought in the court of common pleas, against a physician and surgeon, for so negligently treating the fractured thigh bone of the plaintiff that the plaintiff was rendered a cripple.

In the course of the trial, the defendant contended, but it was denied by the plaintiff, that the defendant had placed the fractured limb upon a double inclined plane, at an angle of 45 degrees, or thereabouts. For the purpose of proving this point, the defendant offered the testimony of a witness who was present at the house of the plaintiff when the defendant brought there the machine, which was afterwards, on a subsequent day, placed upon the fractured limb, and offered to prove by such witness, what statements the defendant himself made to the witness at that time, in the presence of the plaintiff, about the principle upon which the machine operated, and how it might be made a double inclined plane of any angle, by means of a screw. It did not appear that the plaintiff had any knowledge of the method of treating such a fracture, or the proper instrument to be used, nor that he made any reply to the statements of the defendant, although the witness said they were made in the plaintiff's hearing. It appeared that, at the time these statements were made, the plaintiff lay upon his bed with his thigh broken, and so lay eight days, suffering also under other severe injuries.

The plaintiff objected to the admission of this evidence, but the presiding judge, *Mellen, J.*, overruled the objection, and admitted the evidence. The jury having found a verdict for the defendant, the plaintiff alleged exceptions.

L. C. Thayer, for the plaintiff, to the point that the evidence

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admitted should have been excluded, as being the statement of the party himself in whose behalf it was offered, not accompanied by any assent of the plaintiff, and being no part of the *res gestæ*, cited *Commonwealth v. Kenney*, 12 Met. 235; 1 Greenl. Ev. §§ 197-199; *Mattocks v. Lyman*, 16 Vt. 113; *Carter v. Gregory*, 8 Pick. 165.

J. Rockwell, for the defendant.

1. The evidence was admissible, as part of the *res gestæ*. 1 Greenl. Ev. 120; 1 Stark. Ev. 39, 47-49, 52; *Digby v. Stedman*, 1 Esp. R. 328; *Price v. Earl of Torrington*, 1 Salk. 285; *Bateman v. Bailey*, 5 T. R. 512; *Aveson v. Lord Kinnaird*, 6 East, 188; *Phelps v. Foot*, 1 Conn. 387; *Enos v. Tuttle*, 3 Conn. 247; *Pool v. Bridges*, 4 Pick. 378; *Woods v. Clark*, 24 Pick. 35; *Robinson v. Wadsworth*, 8 Met. 67; *Goodhue v. Hitchcock*, 8 Met. 62; *Salisbury v. Gourgas*, 10 Met. 442.

2. What has been said by one party in the presence of the other, may be given in evidence. *Swift's Ev.* 127.

3. The evidence was admissible, as an admission of the plaintiff that the defendant procured the instrument, to use it as a double inclined plane. 1 Stark. Ev. 50.

By THE COURT. Exceptions are often so brief, that it is difficult to judge of the competency or incompetency of particular evidence offered and objected to. It depends much on the preceding evidence, and the posture of the cause at the time it is offered.

It is often better understood by the judge who has the whole case before him, than it can be by the court afterward. One rule is well settled. When the objection is to the admission of evidence, and the objection is that it is irrelevant, if there be any one point, consistent with the facts in the bill of exceptions, to which it is applicable, the court cannot say that it ought not to have been admitted. In the present case, the statement objected to was in fact made in presence of the party, in regard to the construction and use of an instrument, which he had then brought to be applied to the plaintiff's limb, the principle of which was one of the subjects of inquiry before the jury. Both as *res gestæ* and as a statement in

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presence of the party, although we may not have been in a condition to understand it fully, we cannot say that there was error in admitting it. *Exceptions overruled.*

JOSHUA GORTON vs. WILLIAM HADSELL & others.

The question whether the application to a justice of the peace, under Rev. Sts. c. 20, § 35, to call a meeting of the proprietors of a meeting-house, was signed by five at least of such proprietors, as preliminary to the question of the admissibility of the records of such meeting, is for the judge and not for the jury.

Unless a meeting-house, at the time it is torn down by a vote of the proprietors, is not only unfit for public worship, but so old and ruinous as to render its entire demolition necessary, a pewholder is entitled to indemnity for the destruction of his pew.

THIS was an action of trespass, brought in the court of common pleas, for tearing down a pew in the Old Baptist meeting-house in Hancock, of which the plaintiff claimed to be the proprietor.

The defendants filed a specification of defence, by which they justified the taking down of the pew, under and by virtue of a vote passed by the proprietors of the meeting-house, at a meeting held on the 21st day of March, 1850, and called by a warrant issued by a justice of the peace, on the application of five of the proprietors; at which meeting it was voted to give the meeting-house to the town of Hancock, on condition that the town would erect a new town-house out of the materials of the meeting-house. Two of the defendants were two of a committee of three, appointed by the town at a legal town meeting held on the first day of April, 1850, at which meeting it was voted to accept the proposition of the proprietors, and this committee were chosen to take down the meeting-house and construct a new town-house. The other defendant named in the writ was the contractor who took down the house.

The plaintiff, to prove his title to the pew, introduced a deed of the pew from one Southworth to him, dated in 1823, acknowledged and recorded; and evidence that he or his family had, from time to time, occupied the pew on Sundays; and that the house had been occupied as a place of public worship up to the time it was taken down. The defendants objected, that this was not competent and sufficient evidence to prove a proprietorship in the pew; but the presiding judge, *Byington, J.*, ruled that it was evidence from which the jury might infer a proprietorship in the pew.

The defendants introduced the records of the town of Hancock, of the meeting held April 1, 1850, and offered the records of the meeting of persons claiming to be the proprietors of the meeting-house, held on the 21st of March, 1850, and the written application to the justice signed by more than five persons; but offered no records of any meeting of the proprietors prior to such 21st of March, or any evidence by whom the house was owned. But the judge ruled that the records of the proprietors' meeting were not admissible as evidence, without proof that five, at least, of the persons who made the application to the justice to issue his warrant for calling the meeting, were proprietors in the meeting-house at the time of making the application. The defendants then introduced evidence that five of the applicants were proprietors in the meeting-house at that time, and claimed that it was evidence for the jury to consider. But the judge held that it was his province to determine upon the sufficiency of the evidence, as preliminary to the admission of the record; and, being of opinion that the evidence did not show a proprietorship in the house in five of the applicants, refused to admit the records of the proprietors' meeting as evidence.

There was evidence that two of the defendants, namely, Hadsell and Whitman, had nothing to do with the alleged trespass, except that they contracted, as a committee of the town, with the other defendant, Worden, for the taking down of the house. The defendants requested the judge to instruct the jury that, if they were satisfied that Hadsell and Whitman had nothing to do with the taking down of the house

except the making of the contract as agents, then they were not liable in this action ; but the judge declined so to instruct the jury.

The defendants further requested the judge to instruct the jury that, if they were satisfied that the meeting-house, at the time of the alleged trespass, had become unfit for the purpose of public worship, the plaintiff was not entitled to recover any thing in this action ; and they offered evidence that the house was wholly unfit for the purposes of public worship. But the judge ruled that the facts, if proved, would not justify the defendants' acts, and proposed to admit the evidence only in mitigation of damages, declining to instruct the jury that the plaintiff would not be entitled to recover, if the house was so unfit for purposes of public worship.

Whereupon a verdict was taken for the plaintiff, by consent, and the defendants alleged exceptions.

J. Rockwell, for the defendants.

1. The evidence that the five persons who signed the application to the justice, were proprietors in the meeting-house, should have been allowed to go to the jury. *Proprietors of Church in Brattle Square v. Bullard*, 2 Met. 363 ; *Melvin v. Locks and Canals*, 17 Pick. 255.

2. This action cannot be maintained, if the meeting-house had become unfit for the purposes of public worship. *Rev. Sts. c. 20, §§ 36, 38* ; *Gay v. Baker*, 17 Mass. 435 ; *Daniel v. Wood*, 1 Pick. 102 ; *Wentworth v. First Parish in Canton*, 3 Pick. 344 ; *Howard v. First Parish in North Bridgewater*, 7 Pick. 138 ; *Jackson v. Rounseville*, 5 Met. 127.

E. Merwin, for the plaintiff.

1. Whether the applicants were proprietors, was a question, in the first instance at least, for the judge, and not for the jury. The admissibility of the records offered, depended on the fact whether the meeting had been called by a proper application, and this was a preliminary question, which is always for the judge. 1 Greenl. Ev. §§ 49, 177, 425 ; *Russell v. Coffin*, 8 Pick. 143 ; *Witter v. Latham*, 12 Conn. 392 ; *Foster v. MacKay*, 7 Met. 531 ; *Page v. Page*, 15 Pick. 368 ; *Donelson v. Taylor*, 8 Pick. 390 ; *Seymour v. Harvey*, 11 Conn. 275 :

Harris v. Wilson, 7 Wend. 57; *M^r Managil v. Ross*, 20 Pick. 99.

2. Although the house was unfit for public worship, that was no justification to the defendants. The ruling was sufficiently favorable to them, and should be taken in connection with the fact that the house and pew remained and were in use. *Bolivar Manufacturing Co. v. Neponset Manufacturing Co.* 16 Pick. 241; *Fullam v. Cummings*, 16 Verm. 697.

While the house remains, its unfitness is no justification to a trespasser. Proprietors themselves can only take down for the purposes enumerated. Rev. Sts. c. 20, §§ 36-38. *Wentworth v. First Parish in Canton*, 3 Pick. 344. Though the house was unfit, the plaintiff with the other proprietors had a right to determine whether it should be repaired, which the defendants' trespass had rendered impossible.

METCALF, J. Only two of the exceptions taken at the trial have been argued by the defendants' counsel. The others have very properly been given up. And we are of opinion that those which have been argued are not well taken.

1. It is argued for the defendants, that the judge should have left it to the jury to decide, upon the evidence offered, whether the application to a justice of the peace, to call a meeting of the proprietors of the meeting-house, was signed by five of those proprietors, as required by the Rev. Sts. c. 20, § 35. But it is the province of the judge, who presides at the trial, to decide all questions on the admissibility of evidence. It is also his province to decide any preliminary questions of fact, however intricate, the solution of which may be necessary to enable him to determine the other question of admissibility. 1 Phil. Ev. (N. Y. ed. 1849,) Part I. c. 1. And his decision is conclusive, unless he saves the question for revision by the full court, on a report of the evidence, or counsel bring up the question on a bill of exceptions which contains a statement of the evidence. *Dole v. Thurlow*, 12 Met. 157; *Foster v. Mackay*, 7 Met. 531, 538; *Odiorne v. Bacon*, 6 Cush. 185; *Bartlett v. Smith*, 11 Mees. & Welsb. 483; *Doe v. Davies*, 10 Adolph. & Ellis, N. S. 314, 323; *Cleave v. Jones*, 7 Welsb. Hurlst. & Gord. 421.

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2. It is also argued for the defendants, that this action cannot be maintained, if the meeting-house, at the time of the alleged trespass, was unfit for the purpose of public worship. And *Wentworth v. First Parish in Canton*, 3 Pick. 344, and *Howard v. First Parish in North Bridgewater*, 7 Pick. 138, are relied on to sustain this position. But they do not sustain it. In those cases the question was, whether the house was so far decayed, and was so old and ruinous, as not only to be unfit for public worship, but also to render its entire demolition necessary.

And it was held that when such was the condition of the house, a pewholder had no remedy for the destruction of his pew, if the proprietors of the house had pursued the proper course. But this consequence does not follow from the mere fact that a meeting-house, on a certain day, is unfit for the purpose of public worship. A temporary unfitness for this purpose may be caused by accident, or by partial decay, or even by the making of necessary alterations or repairs. And, for aught that these exceptions show, the unfitness of the house in question, at the time of the alleged trespass, may have been the effect of either of those causes.

Exceptions overruled.

FREDERIC TURNER vs. JAMES TWING.

A party's book of accounts is inadmissible, in this commonwealth, to prove cash payments above forty shillings in amount ; nor is the application of the rule affected by the fact that an auditor, at the hearing before him, has examined the book as a voucher.

After a case has been submitted to the jury under the charge of the court, a defendant, who has, throughout the trial, contested an item of the plaintiff's claim on its merits, will be held to have waived an objection which might have been taken at an earlier stage, that such item was not included in the plaintiff's bill of particulars.

THIS was an action of assumpsit, brought in the court of common pleas, to recover the items set forth in the plaintiff's

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bill of particulars. The writ also contained the money counts. The defence was payment and a set-off, consisting of several items. The action was referred to an auditor.

The account in set-off was the same account filed by this defendant, in a prior action, in which Billings Brown was plaintiff, and in which the demand claimed was the following note : —

“ On demand from date, July 10, 1846, for value received, I promise to pay Frederic Turner, or bearer, the sum of one hundred dollars, with use till paid. Given at Stockbridge, this 12th day of May, 1846. JAMES TWING.”

In that action, which was pending when this was commenced, Twing, the defendant, maintained that the account should be a set-off to the note, as the same had been transferred when overdue. The note was introduced by the plaintiff in this action, at the hearing before the auditor, as a reply to the set-off. No objection was made before the auditor to the examination of all these claims.

The auditor made a report, which both parties sought to impeach. On the issue to the jury, the plaintiff objected that the auditor had disallowed, in the plaintiff's bill of particulars, a small item of \$9.25, and two items of cash of five dollars each. The plaintiff also asked a disallowance of a credit of \$100, given by the auditor to the defendant, and objected that the report allowed the defendant the amount of the above note for \$100. The defendant claimed allowance on his set-off, of \$13, which had been disallowed by the auditor. In all other particulars, both parties admitted the correctness of the auditor's report.

The defendant offered in evidence his book of accounts which had been examined by the auditor, and asked that he might be examined in reference to it, upon his suppletory oath. The plaintiff objected that, as the defendant sought to impeach the report only as to the \$13; a cash charge; the book was not competent evidence to go to the jury, and the presiding judge, *Mellen, J.*, rejected it. The defendant then asked that the book might be examined by the jury without his suppletory oath, as a voucher upon which the auditor had passed,

and to show a payment of the item of \$9.25. The plaintiff objected, and the judge ruled that it could not go to the jury.

After the arguments of counsel, and the charge to the jury, the defendant asked the judge to instruct the jury, that the plaintiff could recover nothing not borne upon his bill of particulars, and that the above note, not being thereon, could not be considered or passed on by them as a substantive claim of the plaintiff, on which a verdict for him could be rendered, but was admissible in evidence, and could be considered by them, only as in reply to the defendant's set-off. The plaintiff admitted that it was introduced for that purpose before the auditor, but contended that it was admissible, by silent consent of the defendant, as an affirmative claim, and that the jury should pass upon it as such, and if, upon the evidence, they considered it unpaid, they might find a verdict thereon for the plaintiff. For the purpose of having the whole case passed upon by the jury, the judge so ruled.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

F. Chamberlin, for the defendant.

1. The defendant should have been permitted to put in his book of accounts, sustained by his suppletory oath, as evidence in the case; or, at any rate, it should have been given to the jury as a voucher, upon which the auditor had passed, and for the purpose of showing payment of the \$9.25 charged upon the plaintiff's books and disallowed by the auditor. *Allen v. Hawks*, 11 Pick. 359; *Taunton Iron Co. v. Richmond*, 8 Met. 434; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81, 96.

2. The note not having been owned or possessed by the plaintiff at the commencement of his suit, cannot be the foundation of a verdict in his favor; therefore the court erred in the instructions given as to the note, and also in refusing the instructions requested by the defendant. *Smith v. Kirby*, 10 Met. 150; *Holland v. Hopkins*, 3 Esp. R. 168; 2 B. & P. 243; *Wade v. Beasley*, 4 Esp. R. 7; *Hurst v. Watkis*, 1 Camp. 68; *Hatchet v. Marshal*, Peake's Cases, 172; 1 Dunlap's Practice, 405.

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J. E. Field, for the plaintiff.

BIGELOW, J. Both the items, in relation to which the defendant offered to introduce his book of account, were charges of cash payments, in amount above forty shillings, which, by the long-established rule, cannot be proved by such evidence. Nor does it make any difference in the application of this rule, that the book, in the present case, was examined by the auditor as a voucher. If the auditor admits incompetent evidence at the hearing before him, it is good ground for objecting to his report and setting it aside, but it does not authorize the introduction of the same illegal evidence again at the trial. There is nothing, however, to show that the books of the defendant, in this case, were admitted by the auditor as proof of any charge for which they were not competent. The court was right, therefore, in excluding them at the trial.

The remaining objection is, that the plaintiff was allowed to recover the amount of a note, which was not included in his bill of particulars. The writ contained the money counts, under which it was competent for the plaintiff to recover on the note, but he had failed to specify it as one of the items of his claim. If this objection had been seasonably taken, it would have been well founded. One of the main objects of requiring a bill of particulars or specification of claim is, to notify the adverse party of the several items claimed under the general counts, that he may be prepared to meet them at the trial. Such specification may be amended, on motion seasonably made, and upon such terms as the court may think proper, if it is imperfect and does not include all the claims upon which the plaintiff intends to rely. The chief object in such cases should be, to guard against surprise. But in the present case, both parties proceeded, through the entire trial, upon the assumption that the note was duly specified. One of the main questions in contest before the jury was upon this note, and the merits of this part of the case were fully gone into. No objection was taken by the defendant to a recovery upon it, as a part of the substantive claim of the plaintiff, on the ground of its being omitted in the specification, until after the case had been submitted to the jury

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under the charge of the court. Under these circumstances, the defendant certainly cannot complain of surprise. He had full opportunity to raise the objection at an earlier stage of the trial, when the plaintiff might have obtained leave to amend upon proper terms. But it is quite too late, after a defendant has, throughout a trial, endeavored to defeat a claim upon its merits, and when, from the aspect of the evidence and the instructions of the court, he sees he is likely to fail in his defence, to seek to throw the claim out of the case, on the technical ground that it was not included in the specification of claim. Good faith in the conduct of trials, and an upright administration of justice, require that, in such a case, a party shall be held to have waived all such objections. *Blaisdell v. Gladwin*, 4 Cush. 373, 376.

Exceptions overruled.

**THOMAS P. ELDRIDGE, Administrator vs. JAMES ELDRIDGE,
Executor.**

A testator bequeathed as follows: "Also to my grandson, T. P. E., son of N. E., deceased, the sum of \$2,000, when he becomes twenty-one years of age; and also unto my four granddaughters, H. P., M. L., C. A., and S. M., daughters of the aforesaid N., the sum of \$1,000 each, at twenty-one years of age; and I furthermore will and decree the above-mentioned grandchildren be supported, during their minority, each out of the legacy which I have bequeathed them." By a subsequent clause in the will, after repeating the bequest to T. P. E., he proceeded: "I also give and bequeathe unto my granddaughters, H. P., M. L., C. A., and S. M., daughters of N., deceased, the sum of \$1,000 each, when they severally become of age, excepting what may be necessary for their support during their minority;" and it was held that the grandchildren took vested legacies, so that on the death of S. M., before attaining the age of twenty-one years, her administrator was entitled to maintain an action for such portion of her legacy, with interest, as had not been paid over for her use in her lifetime.

When the language of a will is equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself, or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent.

SHAW, C. J. This is an action brought in this court, by the plaintiff, as administrator of a legatee who died before arriving

at the age of twenty-one, against the defendant, as executor of the will by which it was given. The question is, whether it was a vested legacy, to be claimed by a personal representative, or a contingent legacy, depending upon the fact of the legatee living to be twenty-one years of age.

Griffin Eldridge, by his will, duly proved and allowed, in 1833, gave a legacy to his granddaughter, the plaintiff's intestate. The legacy is twice expressed in the will; in the first instance, where the testator charges the payment of it upon his eldest son, James, the defendant, to whom he devises several parcels of real estate, and whom also he makes residuary devisee and legatee, and sole executor of his will. After the devise to James, his heirs and assigns, he proceeds as follows: "And I will and decree that the said James Eldridge pay over the several sums hereinafter mentioned, in the following manner, . . . Also to my grandson, Thomas P. Eldridge, son of Norman Eldridge, deceased, the sum of \$2,000, when he becomes twenty-one years of age; also to my four granddaughters, namely, Hannah &c., and Sarah Malvina, daughters of the aforesaid Norman Eldridge, the sums of \$1,000 each, at twenty-one years. And I furthermore will and decree the above-mentioned grandchildren (five) be supported during their minority, each out of the legacy which I have bequeathed."

The same legacies are given in a later part of the will, and given directly to the same five grandchildren in these words:—

"Also I give and bequeathe to my grandson, Thomas P. Eldridge, son of Norman Eldridge, late, &c., the sum of \$2,000. I also give and bequeathe to my granddaughters, Hannah, &c. and Sarah Malvina, daughters of Norman, deceased, the sum of \$1,000 each, when they severally become of age, excepting what may be necessary for their support during their minority."

Taking these two clauses to be expounded with reference to each other, we are of opinion that the bequest to Sarah Malvina was a vested legacy, and did not depend upon the contingency of her arriving at the age of twenty-one. The

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rule is well expressed in the opinion of Mr. Justice Metcalf, in the late case of *Furness v. Fox*, 1 Cush. 134, as cited from Wooddeson. It is thus expressed: "If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible."

The question has been often discussed, and the decision must depend much upon the form of words in which the gift is expressed, the other parts of the will, and surrounding circumstances. In the case of *Childs v. Russell*, 11 Met. 16, where a testator, who had directed his executor to vest his personal property in a fund, to secure an annuity to his wife during her life, directed as follows: "And, after her decease, I will and order that all the residue of my estate, real, personal, or mixed, shall be divided among my heirs," &c. it was held, that the time of distribution only, and not the right to a distributive share, was postponed till after the decease of the wife.

But it is a decisive circumstance, in the present case, that the legacy is charged with the support of the legatee during her minority. In the first clause, he directs his son, James, the executor and residuary devisee, to pay to his granddaughter, Sarah Malvina, \$1,000, at twenty-one years of age, and proceeds to direct that she be supported out of it during her minority.

If it stood upon this clause alone, it appears to us that the intent would be quite clear, because it creates an immediate beneficial interest in the legatee, and the payment only is postponed.

And the same construction, we think, must be put upon the last clause. It is substantially this: I give and bequeathe to my granddaughter, Sarah Malvina, \$1,000, when she shall become of age, excepting what may be necessary for her support during her minority. The word "when" applies to the payment, and not to the gift itself. It presupposes that the gift has before taken effect, and a part of it been paid, and provides

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a time at which the balance, if any, shall be paid. We may even suppose that, in case of unusual sickness, or expensive education, it would not be inconsistent with the provisions of the will, that the testator understood and intended that the whole should be paid over for the use of the legatee during her minority.

But further, upon more general grounds, the words "give and bequeathe," in a testamentary paper, import a benefit in point of right, to take effect upon the decease of the testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent. It may be postponed, there may be no assets to answer it, it may not take effect in possession and enjoyment; but, in the mean time, the right will vest, to take effect according to the terms of the will. When, therefore, words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent.

Considering the legacy of \$1,000 as a vested legacy to the granddaughter, we are of opinion that, upon her dying under age, it did not fail, and that her administrator is entitled to maintain an action, for such portion of it as had not been paid over for her use, in her lifetime, with interest.

Judgment for the plaintiff.

I. Sumner, for the plaintiff.

G. N. Briggs, for the defendant.

CLARINDA M. BOWKER, Administratrix vs. MELVIN BOWKER,
Executor.

A testator gave and bequeathed as follows: "Unto my eldest son, M. B., his heirs and assigns, my farm that he now lives on, with all the stock now on said farm that belongs to me, also all my farming tools on said farm, by his paying

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the following sums as hereafter directed; 1st, to my son, D. B., one hundred dollars a year for seven years, without interest, the first payment to be in one year from my decease," &c. ; and it was held that upon the acceptance by M. B. of the devise to him, the legacy to D. B. vested, so that, on the death of D. B. before the expiration of the seven years, his administrator could recover the payments for the years that remained.

THIS was an action of contract, and was submitted to the court of common pleas, and, by appeal, to this court, on the following agreed statement of facts : —

The plaintiff is the widow of the late David Bowker, and administratrix of his estate. David died December 6, 1850, leaving Clarinda, his widow, and two children of the ages of ten and twelve years. David Bowker, and Melvin the defendant, were devisees under the will of their father, Liberty Bowker, the material portion of which is as follows : —

"I give and bequeathe unto my eldest son, Melvin Bowker, his heirs and assigns, my farm that he now lives on, with all the stock now on said farm that belongs to me, also all my farming tools on said farm, by his paying the following sums as hereafter directed; 1stly, to my son, David Bowker, one hundred dollars a year for seven years, without interest, the first payment to be in one year from my decease. 2dly, to my daughter Mary, wife of Robert Sturtevant, one hundred dollars, to be paid as soon after my decease as shall be convenient to pay it; also, to my wife Kata, fifteen dollars per year, in such things as she needs, or money; also, to pay to my daughter Sarah, wife of Jesse W. Johnson, five dollars per year, in such things as she needs, to commence the first year after my decease."

Liberty Bowker died May 21, 1846, and his will was duly proved and allowed. The defendant was executor of the will, and accepted the several devises therein made to him.

The payments falling due to David Bowker on the 21st of May in each year, from 1847 to 1850, both inclusive, were duly paid by the defendant; and this action was brought to recover the payment alleged to have fallen due on the 21st of May, 1851.

If the court shall be of opinion that the plaintiff ought to recover, she is to have judgment for such sum as the court shall direct; otherwise, to become nonsuit.

P. L. Page, for the plaintiff.

1. The fact that there were no devises over, is a strong presumption, in this case, that it was the design of the testator to give a vested and permanent interest to the devisees in the property devised to them. *Baker v. Bridge*, 12 Pick. 27, 33.

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2. The defendant, by accepting the devise to him, has tacitly consented to comply with the conditions of the will. *Felch v. Taylor*, 13 Pick. 133. He cannot accept its benefits, and release himself from its burdens.

3. The presumption of law is in favor of a vested, rather than a contingent devise. 1 Jarman on Wills, 768; *Shattuck v. Stedman*, 2 Pick. 468; *Ferson v. Dodge*, 23 Pick. 287, 292, *Wight v. Shaw*, 5 Cush. 56; *Stimpson v. Batterman*, 5 Cush. 153.

4. If the postponement of payment appears to have reference to the situation or convenience of the estate, the legacy will vest *instanter*. 1 Jarm. on Wills, 756.

5. If futurity is annexed to the substance of the gift, the vesting is suspended, but if it appears to have reference to the time of payment only, the legacy vests *instanter*. 1 Jarm. on Wills, 759, and cases cited; *Shattuck v. Stedman*, 2 Pick. 468; *Goddard v. Johnson*, 14 Pick. 352. In this case futurity has reference to the time of payment only, being for the advantage of the estate and the convenience of the defendant.

6. If the words "and his heirs" were inserted in the will, after "David Bowker," there can be no doubt that such heirs would be entitled to receive such part of \$700 as was unpaid at the death of David. But it is not necessary, even in a devise of real estate, to insert the word "heirs." *Baker v. Bridge*, 12 Pick. 27, 30. *A fortiori*, it is not necessary in a bequest of personal property.

7. Though it was formerly considered the rule that, when a devise was made to one at twenty-one, or if he attain that age, it was a contingent devise, rather than a vested one, it is now otherwise. *Shattuck v. Stedman*, 2 Pick. 468; *Furness v. Fox*, 1 Cush. 134.

J. Rockwell, for the defendant.

1. This legacy is charged upon real estate, and, therefore, upon the death of the legatee, sinks into the land. Swinburne on Wills, pt. VII § 23, pp. 564, 565; *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Pawlett v. Pawlett*, 1 Vern. 204 321; *Yates v. Phettiplace*, 2 Vern. 416; *Jennings v. Looks*, 2 P. Wms. 276; 1 Roper on Legacies, 650-655, where the above

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cases with others are commented on; *Prowse v. Abingdon*, 1 Atk. 482; *Gawler v. Standerwicke*, 1 Bro. C. C. in note to *Green v. Pigot*; *Harrison v. Naylor*, 3 Bro. C. C. 108. There is an exception to the above rule, "where the payment is postponed from a regard to the convenience of the devisee, or the circumstances of the estate charged with it." 1 Roper on Leg. 656-668. This exception does not apply to this case. Again, the legacy is expressly "without interest," which distinguishes the case from *Paterson v. Ellis*, 11 Wend. 259; *Jacobs v. Bull*, 1 Watts, 370; 1 Roper on Leg. 573. The circumstance that the very next legacy charged upon the same land is "to be paid as soon after my decease as shall be convenient to pay it," shows that the payment to David was not to be postponed for the convenience of the devisee, and therefore is governed by the rule and not the exception. Unless the whole of this instalment is recoverable, no part can be recovered. *Wiggin v. Swett*, 6 Met. 194. In *Shattuck v. Stedman*, 2 Pick. 468, and *Furness v. Fox*, 1 Cush. 134, the legacies were not charged upon land, and those cases, therefore, are not applicable. The circumstance that the stock on the farm was also given to the defendant, makes no difference, as the farm was the principal thing, and the legacies were charged upon it. See, also, 1 Jarman on Wills, 755, *et seq.*; Taylor's Precedents of Wills, 582, and note; *Birdsall v. Hewlett*, 1 Paige, 32; *Harris v. Fly*, 7 Paige, 421; *Taft v. Morse*, 4 Met. 523.

2. It is well settled, that if the clause in question had been in these words, "to my son David Bowker, one hundred dollars a year, without interest, the first payment to be in one year from my decease," the payments have terminated with his death. *Savery v. Dyer*, Amb. 139. The words "for seven years," merely limit the time, and do not in any other way alter the effect of the clause.

3. There is no express gift of this legacy to David Bowker previous to the time of the payment, but futurity is of the substance of the legacy. 1 Jarm. on Wills, 760, and note 1.

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1. This legacy is not charged upon the real estate, but is a

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personal charge on the defendant, provided he accepts the property devised to him. The expression used in the devise to Melvin, "by his paying," has the same meaning as "on condition of his paying," which is given as an example of a personal charge upon the devisee in 4 Kent's Com. 540. See, also, *Felch v. Taylor*, 13 Pick. 133. The real estate is never to be charged with the payment of legacies, unless the intention of the testator so to charge it is either expressly declared, or fairly and satisfactorily to be inferred from the language of the will. 1 Roper on Legacies, 670 and note, and cases cited, 682, 683; *Seaver v. Lewis*, 14 Mass. 83; *Kightley v. Kightley*, 2 Ves. jun. 328.

2. Even admitting the legacy to David to have been charged on the real estate devised to Melvin, it comes within the exception to the rule contended for by the defendant. It is not necessary that the will should specify, in direct terms, that the postponement of the legacy was for the convenience of the principal devisee, or in reference to the circumstances of the estate, in order that it should come within the exception; but the court will draw such inference where the circumstances warrant it. The rule adopted by courts would seem to be, that, unless it appears directly from the words of the will, or by just inference, that the testator intended the postponement of the payment to the particular legatee on account of his personal advantage, it will be considered as made for the convenience of the principal devisee, and for the benefit of the estate, and, therefore, be a vested legacy. 1 Roper on Leg. 656-668, and cases there cited; *Lowther v. Condon*, 2 Atk. 127; *Ewes v. Hancock*, Ibid. 507; *Wither v. King*, 2 Bro. P. C. 135; *Sherman v. Collins*, 3 Atk. 319; *Hodgson v. Rawson*, 1 Ves. sen. 44; *Tunstall v. Brocher*, Amb. 167; S. C. 1 Bro. C. C. 124; *Manning v. Herbert*, Amb. 575; *Clark v. Ross*, 2 Dick. 529; S. C. 1 Bro. C. C. 120, in notes; *Kemp v. Davy*, 1 Bro. C. C. 120, in notes. In *Taft v. Morse*, 4 Met. 523, the court held the legacy to be charged on the land, because the words "out of the estate" were used. So in *Gardner v. Gardner*, 3 Mason, 178; S. C. 12 Wheat. 498. No such words are used in this will.

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3. It was not real estate only that was devised to Melvin, but all the stock and farming tools also were given to him by the same clause of the will. If it should be considered that here was a charge upon real estate, then the rule applies, that when the legacy is chargeable on the personal as well as real estate, then so much thereof as the personal fund would extend to pay, should go to the executor or administrator. 1 Roper on Leg. 653.

4. No such rule as that contended for by the defendant ever existed in this commonwealth.

METCALF, J. The court are of opinion that, by the true construction of the will of Liberty Bowker, the sum of seven hundred dollars in money was bequeathed to his son David, the plaintiff's intestate, on no contingency, except that of the acceptance, by Melvin, the defendant, of the devise to him of the farm and stock. If the defendant had refused to accept that devise, the farm and stock would have descended as intestate property to all the heirs, and David would have been entitled to his share of it, instead of the money. We have no doubt that the testator meant that his bounty to his son David, as well as to his other legatees, should immediately attach, and that only the time of payment should be postponed. Such being his meaning, the legacy vested upon the defendant's acceptance of the devise made to him, and he, by that acceptance, became liable to pay it at the times prescribed in the will. See *Furness v. Fox*, 1 Cush. 134; Bac. Ab. Legacies, E. 2; 1 Jarm. on Wills, (1st Am. ed.) 759. If David had died before the testator, leaving issue who survived the testator, it cannot be doubted, we think, that such issue would have been entitled, under the Rev. Sts. c. 62, § 24, to the legacy bequeathed to him.

The plaintiff is to have judgment for one hundred dollars, with interest from May 21, 1851, when that sum would have been payable to her intestate, if he had been then alive.

Judgment accordingly.

Harman v. Inhabitants of New Marlborough.

ISAAC HARMAN vs. THE INHABITANTS OF NEW MARLBOROUGH.

A person is liable to be taxed in the town where he resides, on the first day of May, although he and his estate may be set off to another town by a special statute, before the assessment is completed, and the tax bill delivered to the collector.

THE facts in this case, which was argued by *W. Porter*, for the plaintiff, and *I. Sumner*, for the defendants, are stated in the opinion of the court, delivered by

CUSHING, J. The present case is an action of assumpsit, brought by the plaintiff to recover back from the defendants a tax which he alleges was levied unlawfully on his poll and estate.

The material facts are these : —

By an act of the legislature, passed on the 24th of May, 1851, it was provided, among other things, that a part of the town of New Marlborough, with the inhabitants thereon, should be set off from New Marlborough, and annexed to the town of Monterey ; the act taking effect on its passage.

The assessors of the town of New Marlborough, acting in the ordinary course of town assessments, assessed the plaintiff for his poll and estate, for money legally voted, on the 21st of April, 1851, at a town meeting of the inhabitants of New Marlborough, which was attended by inhabitants of the territory afterwards set off to Monterey. The process of assessment was completed, and the tax-bill dated the 27th of June, 1851, and the bill delivered to the tax-collector on that or a subsequent day, and the tax was paid by the plaintiff under protest.

The plaintiff was also called upon to pay, and did pay, a tax assessed on him the same year, as an inhabitant of Monterey.

We think it clear that the action cannot be maintained on such a state of facts.

The general provision of law is express, that poll taxes in towns shall be assessed upon each taxable person in the particular town where he shall be an inhabitant on the first day

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of May in each year; that all taxes on real estate shall be assessed in the town where the estate lies, to the person who shall be the owner or in possession thereof on the first day of May; and that all personal estate shall be assessed to the owner in the town where he shall be an inhabitant on the first day of May. Rev. Sts. c. 7, §§ 6, 7, 9. Such has been the general law of this commonwealth, from the time of the colony to the present day. A recent experimental enactment for change of the day of assessment in the city of Boston serves only to confirm the general fact.

The plaintiff was, beyond all doubt, an inhabitant of the town of New Marlborough on the first day of May, 1851, and, as such, lawfully assessed there. His legal obligation was fixed on that day. The transfer of part of New Marlborough to Monterey, by statute, afterwards, on the 24th of that month, no more affected his existing legal liability to New Marlborough, than his voluntary removal individually from the town of New Marlborough would have done. On the first day of May his person and property were taxable in New Marlborough, and there alone. The tax which he paid to the town of Monterey for the same year was levied unlawfully, and paid by him in his own wrong, and cannot operate to divest the rights of the town of New Marlborough. Nor can the fact that the assessment in New Marlborough was not in form completed, nor the tax-bill signed, until June, affect the question. Whensoever the books of the assessors were completed, or the tax-bill signed and delivered, it was, in law, a tax assessed on the first day of May.

Judgment for defendants.

GEORGE SEYMOUR vs. ELIZUR N. DEMING.

The judgment of a justice of the peace was rendered in 1827, and the defendant soon after left the commonwealth and resided elsewhere from that time till 1852, when an action of debt on the judgment was instituted ; *Held*, that the action was not barred by any statute of limitations of this commonwealth.

THIS was an action of debt, commenced May 8, 1851, in the court of common pleas, on a judgment of a justice of the peace, rendered July 27, 1827. The defence mainly relied upon, was the statute of limitations.

The plaintiff, in order to take the case out of the statute, introduced two witnesses, who testified that the defendant left the commonwealth some time during the year 1827, or 1828, and had not been in the commonwealth since, and had left no property in the commonwealth except an equity of redemption, which had been seized and sold to satisfy an execution in favor of one Jacob H. Van Deusen, against the defendant.

The presiding judge, *Mellen*, J., instructed the jury that, twenty years not having elapsed, prior to the first of May, 1836, the time when the revised statutes went into operation, since the rendition of the judgment on which the action was brought, the judgment was still in full force and effect, and an action could be maintained upon it.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of \$28.41 ; and the defendant alleged exceptions.

J. E. Field, for the defendant, cited *Smith v. Morrison*, 22 Pick. 430 ; Rev. Sts. c. 120, §§ 1, 9 ; St. 1839, c. 73.

J. Branning, for the plaintiff.

1. The action is not barred by any statute of limitations in force prior to May 1, 1836, twenty years not having elapsed. *Pease v. Howard*, 14 Johns. 479.

2. It is not barred by Rev. Sts. c. 120, §§ 1, 9, the defendant having left the commonwealth in 1827, or 1828, leaving no attachable property, and not having resided here since that time. *Brigham v. Bigelow*, 12 Met. 268 ; *Darling v. Wells*, 1 Cush. 508 ; *Wright v. Oakley*, 5 Met. 400.

SHAW, C. J. To an action of debt on the judgment of a justice of the peace, rendered July 27, 1827, the defendant pleads the statute of limitations as a defence.

From the evidence stated in the bill of exceptions, uncontrolled by any rebutting evidence with reference to which the instructions were given, we are to assume that the defendant left the commonwealth, soon after the judgment, and has never since been within it.

Although so long a time has elapsed since the judgment of the justice was rendered, it appears to us that the action is not barred by the statute of limitations.

It appears to us quite clear, that the action was not barred by the old statute of 1786, c. 52, because that statute did not include actions of debt on any judgments. Such actions, on judgments of courts not of record, were first brought within the statute bar by the revised statutes; and this has been held to include judgments of justices of the peace. *Smith v. Morrison*, 22 Pick. 430.

It is very clear, therefore, that the action was not barred by any limitation, when the revised statutes went into operation, as it might have been, if the statute of 1786, had extended the six years limitation to justices' judgments. *Wright v. Oakley*, 5 Met. 400; *Brigham v. Bigelow*, 12 Met. 268.

We must, then, resort to the revised statutes, to determine whether this action is barred. The marked difference between the rule adopted under the statute of 1786, following the English rule, and that prescribed under the revised statutes, is this; if the defendant is within the commonwealth, at or after the time when the cause of action accrued, the term of six years limitation commences, and would continue to run, although the defendant afterwards absented himself and resided out of the state. Whereas, the Rev. Sta. c. 120, § 9, expressly provides, that if, after any cause of action shall have accrued, the person, &c. shall be absent from, and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement of the suit.

Under this rule, assuming the fact as we suppose it was, that Deming was in the state when the judgment was rendered, in

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1826, or 1827, if the statute had applied, the cause of action would have accrued, and the term of limitation begun to run at that time, and more than six years having elapsed, notwithstanding the defendant's absence from the state a great part of the time, the action would have been barred in 1836, when the revised statutes took effect. But the statute did not apply, and for that reason the action was not barred.

Is it then barred by the limitation created by the combined acts? By the repealing act, passed February 20, 1836, which repealed in terms all the acts revised and consolidated in the revised statutes, it is provided, § 4, that in any case, when any limitation shall have begun to run, and the same or any similar limitation is prescribed in the revised statutes, the time of limitation shall continue to run, and shall have the like effect as if the whole period had begun and ended under the operation of the revised statutes.

The effect of this statute is, in computing the time of limitation, to combine both periods together, as well that which occurred before, as that which occurred after the revised statutes went into operation. The result of these provisions, as we understand them, was expressed in *Wright v. Oakley*, 5 Met. 400, 406, and is confirmed by subsequent decisions. "In practical operation and effect, they are rather to be considered as a continuance and modification of old laws, than as the abrogation of those old, and the reenactment of new ones."

Taking the rule, that both terms are to be connected as if it were one entire term, how would it apply to this case? We are of opinion, that the rule of the revised statutes deducting from the time of the limitation all that portion of time during which the defendant was absent from and resident out of the state, must be applied to the whole term, as well that which elapsed before, as that which elapsed after the statute took effect. *Darling v. Wells*, 1 Cush. 508.

The defendant, then, having been absent and resided out of the state the whole time since 1828, it is clear that he is within the exception of Rev. Sta. c. 120, § 9, and the statute bar does not apply. It is stated in the bill of exceptions, that

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there was evidence tending to show, not only that the defendant had not been in the commonwealth since 1828, but that he had left no property except an equity of redemption, which had been seized and sold to satisfy the execution of another creditor. No stress seems to have been laid on this circumstance by the judge on the trial, nor has it been mentioned in the argument. And we mention it now, only for the purpose of saying that we consider it of no importance, and lest it might be supposed to have some influence in the decision. The exception in the statute is not made to depend on the fact, whether the debtor has left property in the state, attachable or otherwise; but it is absolute, and directs that the time of the debtor's absence and residence out of the state, shall not be computed as part of the term of limitation.

Exceptions overruled.

WILLIAM PORTER & others vs. JONATHAN C. STEVENS & another & Trustees.

A person summoned as trustee is to be charged or not, according as, on a just view of all the facts, the weight of evidence and of conviction shall fairly preponderate; and if it be not affirmatively proved by the answers of the alleged trustee, or by the collateral proofs, that he is chargeable, then he is to be discharged.

THIS action was tried in this court before *Dewey, J.* The only question involved was the liability of the supposed trustees.

Hubbell Smith, one of the supposed trustees, appeared and declared that he had not in his hands and possession, at the time when the writ was served upon him, any goods, effects, or credits of the principal defendants.

Being reëxamined on this answer, his examination thereon gave rise to the only question in the present case, but the particular facts of the answer are not material to the understanding of the case.

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I. Sumner and W. Porter, for the plaintiffs.

1. The trustee must be holden, unless sufficient matter appears in his answer to discharge him. *Webster v. Gage*, 2 Mass. 503; *Patterson v. Buckminster*, 14 Mass. 144; *Graves v. Walker*, 21 Pick. 160; *Shaw v. Bunker*, 2 Met. 376.

2. The answers of a trustee, being in his own language, in all doubtful cases, will be construed most strongly against himself. *Cleveland v. Clap*, 5 Mass. 201, 205; *Kelly v. Bowman*, 12 Pick. 383, 387; *Sebor v. Armstrong*, 4 Mass. 206; *Ripley v. Severance*, 6 Pick. 474; *Scott v. Ray*, 18 Pick. 360, 367.

B. Palmer, for the trustee, Smith.

CUSHING, J. The inquiry in this case is, whether Hubbell Smith, on his own answers, and on the deposition of Edward F. Ensign, is to be charged as the trustee of Jonathan C. Stevens.

The investigation of this general question has brought into view several questions, secondary to the main one; all which, however, are concluded, as the court think, by considerations which lie upon the surface.

The decision of the main inquiry in the case, depends on the rule of construction to be applied to the answers of a supposed trustee. In regard to this point, misconception appears to exist, arising from the enlarged and somewhat strained comprehensiveness of import, which, in the process of time, has insensibly come to be ascribed to certain *dicta* of one of the most eminent of the judges who have heretofore occupied and honored this bench. It may be well, therefore, to go back to the fountain-head of the prevailing error, and then, after having suggested the proper meaning of the series of cases on the subject, to state the true rule of construction, as understood by this court.

The germ of the current idea is to be found in the case of *Webster v. Gage & Trustee*, 2 Mass. 503, of which the marginal note is, "trustee of an absconding debtor will be holden, unless sufficient matter appear in his answer to discharge him."

It would have been just as true, and more in accordance

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with general doctrine, and equally applicable to the case, to reverse the proposition and say: trustee of an absconding debtor will not be holden, unless sufficient matter appear in his answer to charge him.

For, although Parsons, C. J., in the course of the opinion of the court, uses the phrase "As the trustees must be holden, unless sufficient matter appears in their answers to discharge them," yet he is then speaking of the particular case ("the trustees") in which one of the trustees had, by a former disclosure, admitted the possession of assets, and made himself apparently chargeable. In another case, cited by the plaintiff's counsel, the trustee had apparently charged himself by a first disclosure, and then refused to submit to further examination, and was defaulted. *Patterson v. Buckminster & Trustee*, 14 Mass. 144. So, in the case of *Graves v. Walker & Trustee*, 21 Pick. 162, the court remark, *arguendo*, that the trustee "is to give such an answer as will enable the court to say judicially, that he should be discharged." But this observation is to be applied to the particular case, and to a specific fact in the case, of the admitted possession of a sum of money, confessedly not accounted for in the answer.

In the case of *Shaw v. Bunker & Trustee*, 2 Met. 376, 380, the respondent declares only that he *believes* he is not indebted to the principal defendant, and is not chargeable as trustee; and the court of course, say this is not sufficient, and that the trustee must make a full disclosure, and answer all pertinent interrogatories, so that the court may determine the sufficiency or insufficiency of the grounds of belief, as in the case of any other testimony to facts.

A scrutiny of other cases cited by counsel, to the effect that the answers of a trustee, being his own language, in all doubtful cases will be construed most strongly against himself, leads to a similar conclusion, namely, that the court, in these cases, was commenting on the matter of answers in discharge, or evidence of a possession of credits ascertained or admitted by previous answers, and on account of which the burden of proof and of logical conclusion was in a manner shifted, and the question necessarily became how to discharge, not to

charge the trustee. *Cleveland v. Clap*, 5 Mass. 201; *Ripley v. Severance & Trustee*, 6 Pick. 474.

The court have, even already, in a reported case, been constrained to qualify the generality of language previously adopted on this subject, and to say that, although it may be that the language of the trustee is to be construed most strongly against himself, yet his language is not to be distorted, nor forced into any unnatural construction; nor can inferences be drawn from any real or supposed discrepancies in his answers, against the fair and natural import of the language taken all together. *Kelly v. Bowman & Trustee*, 12 Pick. 383, 387.

We think there is no occasion for doubt or obscurity, as to the true rule of construction in all these cases. It is to be deduced from the nature of the process, and from the relation of the parties, limited and prescribed by statute.

The provisions of statutes material to the question, are the following, namely:—

1. Every person having any goods, effects, or credits of the principal defendant, intrusted or deposited in his hands or possession, may be summoned as a trustee, and such goods, effects, and credits shall be thereby attached, and held to respond to the final judgment in the suit, in like manner as goods or estate when attached by the ordinary process. Rev. Sts. c. 109, § 4.

2. If any supposed trustee shall appear, and declare in writing that he had not in his hands or possession, at the time when the writ was served on him, any goods, effects, or credits of the principal, and shall submit himself thereupon to examination upon his oath, and, upon such examination, his declaration shall appear to the court to be true, he shall be discharged. Rev. Sts. c. 109, § 11.

3. If any person so summoned, shall admit that he has in his hands any goods, effects, or credits of the principal, or shall wish to refer that question to the court upon the facts, he may, instead of the declaration before mentioned, make a declaration setting forth such facts as he shall deem material, and

submit himself thereupon to a further examination on oath. Rev. Sts. c. 109, § 13.

4. The answers and statements sworn to by any person as trustee, shall be considered as true, in deciding how far he is chargeable; but either party may allege and prove, by deposition, any other fact, not stated nor denied by the supposed trustee, which may be material in deciding that question. Rev. Sts. c. 109, §§ 15, 16, 19.

5. If any person, summoned as a trustee, shall upon his examination on oath, knowingly and wilfully answer falsely, he shall, out of his own goods and estate, pay to the plaintiff in the foreign attachment the full amount due on the judgment recovered therein, with interest therefor, to be recovered in a special action on the case; and he shall, moreover, on conviction thereof upon indictment, be adjudged guilty of perjury. Rev. Sts. c. 109, § 78.

These are the leading provisions of the statute, which show, beyond the possibility of controversy, what is the legal relation of the parties in the process. It is undeniably this:—

A trustee defendant is brought before the court by legal process, on a writ, sued out by a plaintiff, who alleges that the trustee defendant has intrusted or deposited in his hands or possession, goods, effects or credits, belonging to a third person, the debtor of the plaintiff, which property of his debtor the creditor thus pursues by foreign attachment.

Whether the alleged trustee has in his hands and possession the goods, effects, or credits of the plaintiff's debtor, thus intrusted or deposited, is a question of fact on the pleadings, to be tried and ascertained as other matters of facts are ascertained, by the exhibition of proofs, and these proofs are governed by the established principles of legal reasoning, which are, after all, but the principles of pure universal reason, elicited from the conflict of opposing minds, tested by judicial experience and impartiality, and adapted to the changeful interests of human life.

Now, according to these well-established principles of reasoning and of legal proof, the allegation in the plaintiff's writ, that the party summoned is the trustee of the plaintiff's

debtor, is an allegation merely. It is not of itself evidence, either conclusive or even *prima facie*.

The party summoned, it is true, may admit the allegation, either expressly or by making default; and then the proof consists of his admission. But if the alleged trustee deny the allegation, as he may, then the plaintiff is put on the proof of his allegation. *Affirmantis est probare*.

What follows? undoubtedly that the plaintiff is to proceed to prove his allegation, if he can, by evidence. With this distinction only between the case of a supposed trustee defendant and any other defendant, that, in derogation of the ordinary course of proceedings at law, the trial, by force of the statute, is to be had primarily, on the testimony of the alleged trustee. The alleged trustee deposes here, as a witness, on the assumption that his relation to the creditor and the debtor is, legally speaking, an indifferent one; thus, it matters not to him to which of two parties he pays over a sum of money, or delivers up effects intrusted to his hands, but not belonging to him; and thus, therefore, he may properly testify, though it be, in other respects, his own case. He is to be charged or discharged, to use the specific language of the subject-matter, upon his own answers, with such aid to the court, in arriving at the truth, as may be presented in the shape of collateral depositions. He is a witness, subject to indictment for perjury, like any other witness, if he swears falsely.

Presenting himself in the double capacity, then, of a witness and of a party, a supposed trustee is to be charged or discharged, that is, the allegation of the plaintiff is proved or not, according to the whole evidence and the law thereon, as in other cases.

So far as regards the question of presumption, either of law or fact, the alleged trustee is not to be assumed to be trustee, either by reason of its being alleged by the plaintiff, or by force of the statute, or of any legal inferences derivable therefrom. On the contrary, it is for the plaintiff to prove his allegation, not for the defendant trustee, to disprove it. Neither the nature of the process, nor the relation of the parties, raises such a general intendment of the alleged trustee having effects

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in his hands or possession, belonging to the alleged *cestui que trust*, as to throw the general burden of proof on the alleged trustee, so that the thing to be proved shall be the negative fact of whether the party is not trustee, instead of the affirmative one of whether he is trustee. On the contrary, the primary general question on such a state of the record is, shall the trustee be charged? If it cannot affirmatively be proved, by the answers of the alleged trustee, or by the collateral proofs, that he is chargeable, then he is to be discharged.

The court will not, in disregard of the true legal relation of the parties, assume that a supposed trustee is a prejudiced witness, and act on the rule of treating his testimony accordingly. On the contrary, the law assumes him to be, if he have assets in his hands, a mere stake-holder between the creditor and his debtor; and the law is very far from assuming against him, that he has in fact such credits of the debtor intrusted to him, and then charging him inferentially, in the absence of conclusive negative proofs. He is to be charged or not, according as, on a just view of all the facts, the weight of evidence and of conviction shall fairly preponderate.

The consideration that he is, in one point of view, a witness in his own case, does not change the established rules of reasoning, and of mental conclusion as applied to proofs. He testifies under the ordinary obligations of an oath, in course of law, and his testimony is to be weighed, and its effects determined, by the general principles on which conclusions are to be drawn from any other lawful evidence.

If the alleged trustee swear falsely, and the plaintiff be thus aggrieved, the latter has ample remedy, not only by means of a criminal prosecution, but also by his right of action on the case against the trustee, and of recovering from him the full amount of the debt out of his own goods and effects.

The court have applied the above-stated doctrines of construction to the present case, and the result is, that they do not perceive matter enough to charge the alleged trustee, either in his own answers, or in other evidence introduced, and therefore he must be discharged.

Trustee discharged.

Watkins, Treasurer v. Eames.

WILLIAM O. WATKINS Treasurer, &c. vs. PHILIP EAMES.

E., with others, subscribed a paper, promising to pay a certain sum each to the treasurer of a society, for the purpose of erecting a new meeting-house; the society erected the same, on the faith of the funds subscribed; E. was one of the building committee, and participated in these acts of the society, as one of its members and officers; and the meeting-house was completed and occupied by the society; held, that the treasurer of the society could maintain an action against E. to recover his subscription.

It seems, also, that if a number of subscribers promise to contribute money on the faith of the common engagement, for the accomplishment of an object of interest to all, and which cannot be accomplished save by their common performance, the mutual promises constitute a reciprocal obligation in law.

THIS was an action of assumpsit, brought in the court of common pleas, by the plaintiff, as treasurer of the Congregational Society in the town of Washington, to recover the amount of the defendant's subscription on a subscription paper, a copy of which is as follows:—

"This certifies that we, the subscribers, believing that there ought to be a new meeting-house built by the Congregational Society in the town of Washington, therefore we, the subscribers, agree to pay the sum set to our respective names, to the treasurer or collector of said society, on demand, to be appropriated for the building of said meeting-house."

The writ contained the common counts, and also a special count, and the defendant filed a specification of defence.

It appeared that a legal meeting of the society was held September 28, 1848, called by a warrant, signed by the defendant and others, the society's committee, at which it was voted, "to choose a committee of six, to circulate subscription papers, to raise money to build a meeting-house next season;" that the subscription paper above mentioned was in the handwriting of the defendant, and that his name was the first signature to it; that another meeting of the society was held April 9, 1849, the warrant being signed by the defendant and others as society committee, at which the defendant was chosen and acted as moderator; and it was voted, "to build a new meeting-house, and have it finished by the first of November next, and not go beyond our means;" that, at this last meeting, the said

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subscription paper was exhibited, in its complete state, as it was at the time of bringing this action; that the defendant then stated that he had subscribed \$100, that it was more than he was able to, but that, if he was not benefited in his day his children would be; that at the same meeting, it was voted, "to choose a committee of three as a building committee;" that the meeting was adjourned to April 16, 1849, at which time it was voted "to accept of the plan of the meeting-house drawn by the committee;" that another adjournment was made to April 23, at which time it was voted, "that the contract be read," that the contract was read, and that the building of the new meeting-house was then let out by the committee to William G. Balantine & Sons, for \$1,348; that the defendant was not present at the meeting of April 16, but was present at the meeting of April 23, as well as the other preceding meetings, and that he voted affirmatively on all the above votes.

It also appeared, that the meeting-house was built in pursuance of the contract, and upon the strength of the subscription paper; that the society had no funds, other than those on the subscription paper, out of which to build the meeting-house; that at the time the society voted to build, the subscription paper was completed; that they obtained all the subscriptions they could before they voted to build, between \$1,400 and \$1,500; that the meeting-house was built, and was dedicated January 1, 1850; that the new meeting-house has always been occupied since by the society; and that, so far as it has been paid for, it has been by receipts from the subscription paper.

On the 25th of December, 1849, the defendant withdrew from the society, and has since ceased to be a member.

At a legal meeting of the society held September 12, 1850, it was voted to "accept of the meeting-house." William O. Watkins, the plaintiff, was the treasurer of the society at the time this suit was brought. It is also a fact in the case, found by the jury, the question having been specially submitted to them, that a demand was made on the defendant for the amount of his subscription before suit brought.

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The defendant contended that parol evidence was inadmissible of an acceptance by the society of the subscription, at September 12, 1850, because it was after the building was erected; that there was no sufficient evidence that the subscription had been accepted; or that the plaintiff had paid money for the defendant at his request; or that the money subscribed was needed; or that the subscription paper was not sufficient without the defendant's subscription; and that, upon the foregoing facts and evidence, the action could not be maintained on any of the counts; and he requested the judge, *Byington, J.*, so to instruct the jury. But the judge declined so to do, and instructed them that, on all the evidence in the case, if they believed it and it was true, it was competent for them to find that a legal promise had been made by the defendant, and upon sufficient consideration, and so to return a verdict for the plaintiff, for the amount claimed, \$100, with interest from the time of the demand.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. Rockwell, for the defendant.

E. Merwin, for the plaintiff.

CUSHING, J. The report of this case appears to us to bring it directly within previous decisions, especially those of *Thompson v. Page*, 1 Met. 565, and *Ives v. Sterling*, 6 Met. 310, both which the present case very strikingly resembles; and, on the authority of those decisions, we should feel bound to say that here was a valid promise with lawful consideration.

Opinion has fluctuated, it is true, upon the question how far, in a common subscription by several persons, to an object of public utility, the promise of each one is a consideration for that of another. It has been objected that, to assume the respective promises as consideration one for the other, is to beg the whole question, and to reason in a circle. But if it clearly appear that a number of subscribers promise to contribute money, on the faith of the common engagement, for the accomplishment of an object of interest to all, and which cannot be accomplished save by their common performance, then it would seem that the mutual promises constitute reciprocal obligations.

Case v. Benedict & others.

In addition to this, in the present case are other facts, going to make out legal consideration. The defendant appears to have acted a primary part in the business, and so to have induced both the other signers and the congregational society of which they were members, to undertake to construct the proposed meeting-house by voluntary subscription. He was a member of the committee of the congregational society, which called the society together to consider the subject; the subscription papers are in his own handwriting; he is at the head of the subscribers; if not present at the adjourned meeting of the society at which the plan of the meeting-house was accepted, yet he was at a subsequent meeting, when a contract based on that plan was adopted; he presided as moderator; he was one of the building committee; and the meeting-house was commenced and completed on the faith of the several subscriptions. All these are cogent arguments of consideration. Moreover, there was in the paper a lawful and sufficient promisee, the treasurer of the society, and consideration moving as between the defendant and the society.

Exceptions overruled.



TIMOTHY S. CASE vs. ELIAS BENEDICT & others.

A member of a school district who agrees with a committee of the district, to convey to the district a lot for a school-house, and delivers them a deed thereof, taking their note in payment, is estopped to deny the authority of the committee to accept such deed.

TRESPASS *quare clausum fregit*. The writ was dated June 7, 1850, and the case was submitted to the court of common pleas, and, by appeal, to this court on an agreed statement of facts, of which the following are the most material:—

The plaintiff was lawfully seized of the land of the alleged trespass, before and up to the time when the deed hereinafter mentioned was executed, and has continued in the actual possession to the present time, without interruption except as hereinafter stated.

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The defendants entered upon the land, on the 31st day of May, 1850, and run out a line, and made a division fence between land of the plaintiff and land which the plaintiff contracted to sell to School District No. 14, in Pittsfield, as hereinafter stated. This is the trespass sued for. The plaintiff was present and forbade their entry.

In the early part of April, 1850, Caleb Goodrich, and others, claiming to act as a committee of School District No. 14, made a verbal contract with the plaintiff for the purchase of the premises, for the purpose of erecting a school-house thereon, and gave their note for the price.

The parties went on the ground to be conveyed, and set up the boundaries, and about the 7th of April, the plaintiff delivered a deed of the premises, in the usual form with a release of the wife's dower, to one of the committee, and received their note. The grantees in the deed were the inhabitants of School District No. 14.

It was stipulated in the deed, that the grantees should make and maintain the division fence. A meeting of the district was held April 5, at which time a committee was chosen to purchase land for a school-house, who made the contract with Case, above mentioned. Another meeting was held by adjournment, April 19, when Case acted as moderator, and the committee reported that they had received from Case a deed of the land in question to the district. On motion that the deed should be read, one of the committee handed the deed to Case, who read the deed to the meeting, and then put it in his pocket and carried it away, leaving the note. After Case had left the meeting, it was voted to accept the land purchased by the committee; and the same evening, one of the committee called on Case and requested him to deliver the deed back, and take the note; but Case refused to do so, and, within a few days after, destroyed the deed.

The meeting at which the transactions above mentioned occurred, was not called by the warrant of the selectmen or prudential committee.

The case is submitted to the decision of the court upon the foregoing facts, and if the plaintiff is entitled to recover, he is

to have judgment for one dollar damages and costs ; and if the defendants are entitled to recover, they are to recover their costs. The court may draw any inferences from the facts stated, which a jury would be authorized to draw were the case tried by them.

E. Merwin, for the plaintiff.

1. The meeting of April 5, 1850, and all its adjournments, were illegal. It was not called by the warrant of the selectmen or prudential committee. Rev. Sts. c. 23, § 46. No notice was given to the inhabitants of the district. § 47.

2. Consequently, all the votes under which the defendants attempt to justify, were illegal, and the persons claiming to be a committee of the district had no such authority. *School District in Stoughton v. Atherton*, 12 Met. 105.

3. As this committee were not the agents of the district, there was no legal delivery or acceptance of the plaintiff's deed ; nothing passed to the district by it, and the plaintiff had a right to revoke and annul it.

4. This is not altered by the note which the plaintiff received and subsequently returned. It was taken under the misapprehension that the promisors were agents of the district, and so the district were bound by the covenants in the deed. It created no obligations between the plaintiff and the district; no consideration passed from the district, or at their request. Still less, can the effect of this negotiation between the plaintiff and the promisors be to vest an estate in the district without their knowledge or consent.

5. Admitting, however, that the plaintiff's deed passed the estate to the district, the defendants are, nevertheless, trespassers against the plaintiff. The plaintiff was in the actual occupation, and the defendants had no license or authority from the district. *Graham v. Peat*, 1 East, 244 ; *Inhabitants of Barnstable v. Thacher*, 3 Met. 239 ; 2 Saund. Pl. & Ev. 295, and cases cited ; 1 Chitty Pl. 202 ; *Slater v. Rawson*, 6 Met. 439, 445 ; *Williston v. Morse*, 10 Met. 17, 25.

P. L. and J. Page, for the defendants.

By THE COURT. The plaintiff having dealt with the committee as the committee of the school district, of which he

himself was a member, as an authorized committee of the district, having taken security satisfactory to himself, and having with his wife, made, executed, and acknowledged a conveyance to the district as a corporation and delivered it to a committee recognized by him as their authorized agents to accept it, is estopped to deny the authority of the committee, or the regularity of the meetings, at which they were chosen. The district was a corporation capable of taking a conveyance of real estate; *School District in Stoneham v. Richardson*, 23 Pick. 62; they must act by agents; an acceptance of a deed by a committee recognized by the grantor as their agents, is, as against him, an acceptance by the district, and *primâ facie*, vests the property in them. Delivery to a committee, to the use of the district, was a delivery to the district; and unless they denied the authority of the committee, the grantor could not.

The unauthorized and wholly unwarrantable act of the plaintiff, in getting possession of the deed, under color of doing an official act of duty as moderator of the district meeting, could not divest the title of the district, acquired by the execution and delivery of the deed.

But it is said that, at the time of the alleged trespass, the plaintiff was in actual possession, not having surrendered it, and therefore, trespass *quare clausum fregit* would lie. But this does not follow; if he was in possession, he was so of his own wrong; the right of possession followed the right of property, and the title being in the district, the entry of any committee man, or other member of the district, was not a wrong done to the plaintiff.

Judgment for the defendants.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF HAMPSHIRE, FRANKLIN, AND HAMP-
DEN, SEPTEMBER TERM, 1852, AT NORTHAMPTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, }
HON. THERON METCALF, } JUSTICES.
HON. GEORGE T. BIGELOW, }
HON. CALEB CUSHING, }

TRUSTEES OF HOPKINS ACADEMY vs. LEWIS DICKINSON.

If the course of a river not navigable changes, and cuts off a point of land on one side, making an island, such island still belongs to the original owner.

In such case, if the old bed of the river, being gradually deserted by the current, fills up and new land is formed, such newly formed land belongs to the opposite riparian proprietors respectively, to the thread of the old river.

And if new land be formed in the river above said island, independent of the island and not by a slow, gradual, and insensible accretion to it, such new land above belongs to the opposite riparian proprietors respectively to the *filum aquæ*, or thread of the river.

The thread of the river in such case would be the medium line between the shores or natural water-lines on each side at the time the new land was formed, without regard to the channel or deepest part of the stream.

WRIT OF ENTRY. The whole case appears in the opinion of the court.

C. P. Huntington, for the demandants.

D. Aiken, for the tenant.

SHAW, C. J. This was one of several real actions, depending on the same facts and principles; and the parties to the others have agreed to abide by the decision in this.

The case comes before the court upon a report of the chief justice, before whom the cause was brought to trial at Northampton. The evidence being given in, by agreement of parties, the case was taken from the jury without a verdict, to be submitted to the whole court upon the evidence to be reported. It was further agreed, that upon the grounds to be stated by the court, one or more commissioners should be appointed, to make surveys, draw a plan, and make a division of the land, conformably to the principles announced by the court, and under such direction as they might give, and report thereon to the court; and when the report should be accepted, judgment in this and the other cases to be rendered accordingly.

The land in controversy is newly-made land, formed in what was formerly the bed of Connecticut River, lying between the towns of Hatfield and Hadley. It has been gradually formed, in consequence of a change in the bed of the river, in the manner hereafter stated. The demandants, trustees of an incorporated academy, are owners of a tract of land in Hadley, on the east side of Connecticut River, known as the school meadow land, bounded formerly by a curved line projecting considerably into the river. As long ago as 1805 or 1806, the water, in high freshets, began to find its way across the school meadow land. This increased from year to year, until the current was formed that way; and in 1825 a great portion, if not the main body of the stream, passed that way, thus taking a more direct line across, instead of following the former bend of the river. This continued to increase until it became the main channel, and the current through the old passage ceased. The new channel, thus formed, cut off and insulated the most projecting part of the school meadow land; the part, thus left, remained unchanged in position, and became an island, forming the right bank of the new stream as far as it extended.

In the mean time land began to form in various places in the old bed of the river thus deserted by the current, between

the school meadow lands, thus insulated, on the east side, and the Hatfield shore on the west. The old channel, or deepest part of the river before the change, was not in the middle of the river, but nearest the Hatfield shore.

There was some conflicting evidence as to the place at which the alluvial land began to form ; it being contended by the demandants that it began to form on the upper part of the island, and extended over towards and near the Hatfield shore. On the contrary, it was contended by the tenant that it began to form near the Hatfield shore, and extended thence into the river. But this was considered immaterial, the chief justice being of opinion and proposing to instruct the jury, that the demandants, as riparian proprietors, could not claim any of the land in controversy, being the land newly formed between the island and Hatfield shore, more northerly, that is higher up river, than their land extended before the formation of the land in controversy, and if it had so extended since the change in the course of the river, that fact might be inquired into by the commissioners to be appointed.

Several rulings and proposed instructions to the jury are specified in the report, which it is not necessary here to state, because they were substantially adopted, and are restated in the opinion of the full court.

The tendency of the evidence was, to show that in all that part of the river bed, which had become stagnant by the change of current, sediment began to settle and accumulate, shoals and islets arose, detached, at first, but gradually uniting with each other ; when above water, vegetation came in, and ultimately land was formed, which was available for use and valuable.

The question is, whose property are the lands thus newly formed, and upon what legal principles shall the right of property in them be ascertained ?

It appears to be well settled by the law, both of this country and of England, and founded on the rule of the civil law, that on rivers not navigable, the right of the proprietors of the land on each side extends to the thread of the river, or middle

line of the stream. This is taken to be the law in this commonwealth, subject to certain rights of the public to use the water for boating and rafting, and subject also to regulations in regard to fisheries. These modifications or exceptions are not applicable to the present question.

This question arises respecting the right of the riparian proprietors to certain lands formed in the bed of Connecticut River, between Hadley and Hatfield. This land, it appears by the case, was formed on a part of the soil which formerly constituted the deep bed and channel of the river, where the main current of water formerly flowed, in consequence of the river having changed its course and taken a new channel on the Hadley side. The effect of this has been, that the main body of the water has for some years flowed in a new channel, by means of which the water on the old bed of the river became stagnant, deposits of earth and sand were formed in various parts of it, which have gradually risen above the surface and united with each other so as to become valuable land. The question is, whose is this land?

It has been repeatedly settled, both in this state and in Connecticut, that the Connecticut River, though valuable for the purposes of boating and rafting, yet, so far as riparian proprietorship is concerned, is considered a river not navigable, as that term is used in the common law. *Adams v. Pease*, 2 Conn. 481; *Bardwell v. Ames*, 22 Pick. 333.

The general rule, as a rule of the common law of England, was long since laid down as unquestionable by Lord Holt, who says, in the case of *Rex v. Wharton*, Holt, 499, that a river, of common right, belongs to the proprietors of the land between which it runs, to each that part nearest his land. This has been frequently, if not uniformly, adopted as the established rule. Bac. Ab. tit. Prerogative; Sir John Davies's R. 155. And the same rule has been repeatedly declared and adjudged in this commonwealth. It is derived mainly from the rule, that the riparian proprietor is owner of the soil under the water, and by the general law of property becomes entitled as of right to all accessions.

The general rule is recognized and established in thi

commonwealth, in the leading case of *Ingraham v. Wilkinson*, 4 Pick. 268. It is a case which goes far to settle principles which must govern the present. It recognizes the rule of the common law, that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the court deduce the right of property in an island, which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river, as it was immediately before such island made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line, and held in severalty by the adjacent proprietors.

This seems to be clear and intelligible, and has a direct bearing upon the present case. But the difficulty in applying the rule arises from this consideration, that, from the very nature of things, the thread of the river may itself be frequently changed by circumstances. Where there is a gradual accretion on one shore, forming an alluvion and permanent addition to that shore, it must tend to change the thread of the river, by carrying the medium line towards the opposite shore. If, at the same time, with such accretion on one side, there be a wearing away of the opposite bank, the thread of the stream will be moved an equal distance in that direction. But if the river does not wear away on the opposite side, then the whole bed is narrowed, and the thread of the river will be moved to an extent equal to one half of the new formation, and in the same direction.

So in the case just now supposed, of an island arising in the middle of the river, it is divided by that line which was the thread of the river immediately before the rise of the island. But that line must thenceforth cease to be the thread of the river, or *filum aquæ*, because the space it occupied has ceased to be covered with water. But, by the fact of an island being formed in the middle of the river, two streams

are necessarily formed by the original river dividing it into two branches; the island itself, having become solid land, forms itself a bank of the new stream on the one side, and the old bank on the main shore forms the other. And the same rule applies on the other side of the island. There must, then, be a *filum aquæ* to each of these streams, whilst the old *filum aquæ* is obliterated to the extent to which land has taken the place of water. But this island, having all the characteristics of land, may soon be divided and subdivided, by conveyances and descents, and all the modes of transmission of property known to the law, and thus become the property of different owners. Now suppose another island formed in one of these branches, between the first island and the original main shore. It seems to us that it must be divided upon the same principle as the first; but, in doing it, it will be necessary to assume as the *filum aquæ* the middle line between the first island and the original river bank on that side.

If this is a correct view of the practical consequences flowing from the adoption of the principle stated, and it appears to us that it is, an obvious difficulty presents itself, in making that line a fixed standard for the demarcation of the boundaries of real estate between coterminous proprietors, which is itself fluctuating and changeable. Perhaps a satisfactory answer to this may be found in the suggestion, that the rule is equitable, and as certain as the proverbially variable nature of the subject-matter will admit; and, in adapting it to the varying circumstances of different cases, a steady regard must be had to the great principle of equity, that of equality.

This changing of the *filum aquæ* seems not to be distinctly treated in any case, but it seems that it must necessarily occur in many cases. In addition to those already mentioned, suppose a river, by slow accretions or washing away, widens or narrows on both sides as it may, but unequally, the *filum aquæ* must change its actual line. Suppose an island dividing a river for some distance shall be wholly washed away, the *filum aquæ* must shift and pass along a line which was formerly solid land. In a passage cited by Chief Justice Parker, in *Ingraham v. Wilkinson*, from lord Hale, such a shifting of

the *filum aquæ* in one case is alluded to. The passage is this: "If the *filum aquæ* divide itself, and one part take the east and the other the west, and leave an island in the middle between both *filæ*, the one half will belong to the one land and the other to the other." And Lord Hale adds further, in the same connection, "that this is to be understood of islands newly made; for if a part of an arm of the sea — and the same thing is true of a river, which is material to the present case — by a new recess from his ancient channel, encompass the land of another man, his propriety continues unaltered." Hargrave's Law Tracts, 37.

It may be added here, on the authority of Lord Hale, that he derives the title to islands, in creeks or havens or arms of the sea, from the right of property in the soil under the water, stating that this is *primâ facie* and of common right in the king; yet if, in point of propriety, it doth belong to a subject by grant or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject. This is applicable, by strict analogy, to the case of a river not navigable, when the right of property is admitted to be in the riparian proprietor, *ad filum aquæ*.

If this is a correct view of the general principle of law, and its modifications under certain changes, it seems to us sufficient to settle the present case. It appears that the demandants have long been owners of a tract of land situated in Hadley, and forming, for some distance, the east bank of Connecticut River. The tenant and other proprietors were owners of lands in Hatfield, forming the west bank or shore of Connecticut River, opposite the school meadow land. Many years ago the water of the river began to find its way, at first in small quantities and in high freshets, over the school lands, till at length it formed a deep cut, and ultimately the main or sole channel of the river. A small portion of the school lands, forming the original east bank of the river, was not washed away, but remained unaffected by the change. The old channel, on the west side of this portion of the school land, now become an island, being deserted by the current, began very slowly to fill up, and after many years, say twenty

or more, became covered with vegetation; and this is the land which is the subject of this controversy.

Now, as to this island, it is not newly made, but a portion of the old solid school land; it remains unchanged in site or character, and is, as it was before, the property of the demandants. It also remains a fixed portion of the easterly bank of that branch of Connecticut River, which now lies between that island and the Hatfield shore. There is nothing to show that the *filum aquæ* has changed to the extent up and down the river, to which this island still extends. Each who was then riparian proprietor owned the soil under the river to that *filum aquæ* or thread of the river, and the newly-formed land will belong to them respectively to that line.

In regard to the newly-formed land, if any, which lies further north, or further up stream than the head of the island constituting a part of the old school land, there is certainly more difficulty.

If before these sand-banks, flats and islands began to form in the old bed of the river, this island had extended upwards, by alluvion strictly so called, it might have been deemed part of the school lot and of the island, and would have modified and regulated the *filum aquæ* to a like extent upwards. By alluvion here, we mean such slow, gradual, and insensible accretion, that it cannot be shown at what time it occurred; but we are not aware that it is claimed that this insular portion of the demandants' land was thus extended upwards by such insensible accretion, previously to the formation of the land in question. If it be claimed that it was, it will be a proper subject to be inquired into and reported on by the commissioners. When the head of the island, or school meadow land is ascertained, a line is to be struck across the river, at right angles to its general course, at such head of the island, and in all that part of the stream below such line, the thread of the river will be the middle line between the island and the Hatfield shore.

Then we must consider that part of the river lying above the island; and here the *filum aquæ* was probably modified by the great change in the bed of the river, in effect forming two

streams, one each side of the insulated part. It is manifest that, by breaking out a new channel to the east, and yet retaining, at least for a considerable time, its old channel on the west, the river above the dividing point for some distance was more or less widened. It was a very slow process by which, in the more sluggish current on the west side, shoals, sand-bars, islets, and ultimately firm land were formed. In the mean time, the river had formed for itself a new east bank on the Hadley side, the old west bank remaining as it was on the Hatfield side. So long as that state of things continued, the *filum aquæ* would naturally be extended, forming the middle line between such old west bank and such new east bank. If this east bank was thus formed, and the thread of the river above the island thus was extended before the new land formed, then it appears to us that the law of proprietary division must be determined by the *filum aquæ*, as thus extended easterly, and that this rule must be applied to all that part of the island above a line drawn at right angles with the river, across it at the head of the island. All lying westerly, or on the Hatfield side of the *filum aquæ* thus ascertained, if any, belonging to the Hatfield proprietors, and all easterly of such *filum aquæ* to the school meadow proprietors, or the proprietors lying on that side.

In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream. And in ascertaining the shores, or water lines on each side, to measure, it will be proper to find what those lines are when the water is in its natural and ordinary stage at a medium height, neither swollen by freshets or shrunk by drought.

These views, we think, embrace all the legal principles necessary to determine the right of property in these newly-formed lands, as between the opposite riparian proprietors. The division of these lands amongst the Hatfield proprietors themselves, will be regulated by the rule laid down in the case of *Deerfield v. Arms*, 17 Pick. 41. The effect of that rule is, to give each one a length on the new water line proportioned

 Howe & others v. Lawrence & others.

to his length on the old water line, whether the one be longer or shorter than the other. In applying that rule in this case, each Hatfield proprietor will have a line on the thread of the river, when ascertained, proportioned to his line on the Hatfield shore before the river filled up.

Pursuant to the agreement of the parties, one or more commissioners are to be appointed, unless agreed on by the parties, to survey the land, lay down lines for the division of the same, agreeably to the principles thus stated, and make their report to the court.



WILLIAM A. HOWE & others vs. MYRON LAWRENCE & others.

A *bonâ fide* sale, for a valuable consideration, by one partner to another, of all the partnership effects, is valid and the property so conveyed becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent.

By the insolvent law of this commonwealth, St. 1838, c. 163, § 21, the separate estate of partners must be first distributed to separate creditors, although there be no solvent partner and no joint estate, to which the joint creditors can resort.

THIS was a petition to this court, under the insolvent law of 1838, c. 163, § 18, seeking to reverse an order of distribution made by Myron Lawrence, Esq., a commissioner of insolvency, in the county of Hampshire, on the estate of William W. Gardner, an insolvent debtor. The case was referred to a master, upon whose report the following facts appeared:—

On the first day of January, 1850, Henry D. Shaw, and William W. Gardner, formed a copartnership in trade, in Haydenville, in the county of Hampshire, under the name of Shaw and Gardner. On the twenty-fourth day of January, 1851, the parties being mutually dissatisfied, said firm was dissolved, and Shaw conveyed all his interest in the partnership property to Gardner, he agreeing in consideration therefor, to pay all their joint debts. The firm and both partners were at that time insolvent, although there was not suf-

ficient evidence to warrant the belief that either partner then knew it. Immediately after the dissolution, Gardner informed the creditors of the firm that he should continue the business, and had agreed to pay all the partnership debts of Shaw and Gardner. He did continue the business a few weeks, and in that time added to the stock, to an amount of five or six hundred dollars. On the twenty-seventh day of February, 1851, said Gardner filed a petition before said Myron Lawrence, Esq., for the benefit of the insolvent laws of this commonwealth, and his whole stock in trade, a greater portion of which was the identical property formerly owned by Shaw and Gardner, passed into the hands of Gardner's assignees. It was sold by them for \$1,670.39. The claims against the former firm of Shaw and Gardner, proved against Gardner's estate, were \$5,050; and his private debts proved, amounted to \$850. The said Myron Lawrence, commissioner of insolvency, ordered that the separate creditors of said Gardner should be paid in full from his estate, and that the balance remaining should be distributed to the joint creditors of the firm of Shaw and Gardner. The prayer of the petition in this case was, that all that portion of said Gardner's estate which had formerly belonged to Shaw and Gardner, might be distributed to the creditors of that firm, to the exclusion of the separate creditors of Gardner, or that his entire estate might be distributed, *pari passu*, to the joint and separate creditors. The petitioners were creditors of the firm of Shaw and Gardner, and had proved their claim against Gardner's estate. The respondent Lawrence, admitted the facts set forth in the petition and submitted himself to the direction of the court. The other respondents were separate creditors of said Gardner, who had proved their claims against his estate, and objected to the prayer of the petition. The said Henry D. Shaw was also in insolvency in the county of Hampden, and there was no property of the former firm of Shaw and Gardner except what had been conveyed to said Gardner as before stated.

C. P. Huntington, for the petitioners.

1. Both partners being insolvent, equity will not uphold a

contract of dissolution, which if made would transfer partnership property to the postponement of partnership creditors and to the preference of private creditors. 2 Story's Eq. § 1,265, p. 698; §§ 674, 675, 676; *Ruffin, ex parte*, 6 Ves. 120, and note 8; *Williams, ex parte*, 11 Ves. 5; *Burnside v. Merrick*, 4 Met. 537, 542; *Dyer v. Clark*, 5 Met. 562, 575; Collyer on Partnership, §§ 894, 920; 3 Kent Com. 64, 65, note.

2. But the agreement to dissolve transferred the property subject to the payment of partnership debts, and equity will enforce the understanding of the parties. *Duff v. East India Company*, 15 Ves. 198.

G. Ashmun, for the respondents.

BIGELOW, J. Upon the facts reported by the master in this case, two questions arise.

The first is, whether the property, which belonged to the partnership of Shaw and Gardner, and which, upon the dissolution of the partnership, on the twenty-fourth of January, 1851, was sold and transferred by Shaw to Gardner, is to be treated as the separate estate of Gardner, and to be appropriated as such to the payment of his separate debts; or whether, notwithstanding the sale and transfer by one partner to the other, it is still to be regarded as joint estate, and to be applied to the payment of the debts of the partnership accordingly.

The right of copartners upon dissolution to transfer the joint property to one of the firm, is clear and unquestionable. The effect of such transfer as between the partners is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate. It would seem to follow as a necessary consequence, that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property, upon which they had any special claim or lien. If in such transfer there is no fraud and collusion between the copartners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate with all the rights

and incidents both in law and equity, which properly attach thereto. The mere fact of the transfer of the property does not in any way affect the rights of the joint creditors. During the continuance of the partnership, and before the institution of proceedings in insolvency, the creditors of the firm have no specific claim or lien, and, strictly speaking, no equity as against the effects of the partnership. They can only institute actions at law for their debts against the firm on which they can take the partnership property, or the separate estate of each partner, or both, for the purpose of satisfying the executions, which they may obtain upon their judgments against the firm. The joint property, after its transfer to one of the copartners, is equally within the reach of legal process by the creditors of the firm as if it had remained the property of the partnership. Beyond this right to seize the joint property on legal process, the creditors of the firm, before proceedings in insolvency, have no control over the partnership effects, and no right, either in law or equity, to restrain the disposition of them. The partners have the power to transfer them for a valuable consideration to each other or to strangers. The only limitation upon this right is, that it shall be exercised *bonâ fide*, and without any intent to defraud the creditors of the firm or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency. The *bonâ fides* of the transaction is, therefore, the only test by which to determine the right of joint creditors to have property, which has been transferred upon dissolution to an individual member of the firm, applied to the payment of the joint debts. If the transfer has been made honestly and for a valuable consideration, the property has thereby become separate estate, wholly free from any claims of the joint creditors. These principles are fully recognized in the adjudged cases both in this country and in England. Collyer on Part. §§ 174, 894, 903; Story on Part. § 358; *Ex parte Ruffin*, 6 Ves. 127; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Rowlandson*, 1 Rose, 416; *Campbell v. Mullett*, 2 Swan. 575; *Allen v. Center Valley Co.* 21 Conn. 130, 137; *Ferson v. Mumce*, 1 Foster, 462, 469.

These cases also recognize it as a settled rule that joint estate is not, so far as the rights of creditors are concerned, that which was such at the time of the dissolution, but that in which the partners are jointly interested for the purposes of the partnership and the settlement of its concerns at the time of the institution of proceedings in insolvency by a member of the firm.

The application of these principles to the present case is decisive against the right of the joint creditors to require the property, transferred by Shaw to Gardner, to be appropriated primarily to the payment of the debts of the firm. *Prima facie* it is the separate estate of Gardner, and the burden is on the petitioning creditors to show that it was conveyed to him *malâ fide* and in fraud of the rights of creditors. There is nothing in the facts reported by the master from which any such inference can be fairly made. The dissolution took place, because the parties were mutually dissatisfied, and the retiring partner relinquished his right to the partnership property, in consideration of an agreement by his copartner to assume and pay the debts of the firm. It is not pretended that the business of the firm has resulted in any surplus, nor that the agreement to pay the debts was not a fair and full consideration for the transfer of the retiring partner's interest in the partnership property. The subsequent conduct of Gardner is strongly confirmatory of the good faith of the transaction. He continued to carry on the business, formerly conducted by the firm, and notified the creditors by letter of the dissolution, and that the business would be continued by himself. While he so carried on business on his sole account, he made considerable additions to the stock on his own credit, amounting to five or six hundred dollars. Nor is there any positive evidence that either of the copartners, at the time of the dissolution, knew or believed that the copartnership would not be able to pay its debts in full, although in fact it subsequently turned out to have been at the time insolvent. Even if it were insolvent within the knowledge of the partners, at the time of the dissolution and the transfer of the property, it is by no means certain that the transaction would then be

fraudulent. Collyer on Part. § 902; *Ex parte Peake*, 1 Mad. 346. But it is sufficient for the present case that there is no proof of any such knowledge by either of the copartners.

It is not to be inferred, however, that any conveyance or transfer of joint property to a copartner made with a knowledge of the insolvency of the firm and with an intent to deprive the creditors of its proper application to the payment of the joint debts, would defeat the right of the joint creditors in proceedings in insolvency to follow the partnership effects and have them appropriated to the payment of the debts of the firm. Such conveyance would be in fraud of the law, and equity would at once set it aside. It is only where partners act fairly for the purpose of dissolution and winding up the affairs of the firm, that creditors will be bound by a change of the partnership property, to the separate estate of one of the copartners.

It was urged by the counsel for the petitioners, that, as copartners have a lien upon the partnership effects for the discharge of all the debts of the firm, even after a dissolution, this lien might be made available in the present case for the benefit of the joint creditors; and that in this way the equities of the creditors might be worked out through the medium of that of the retiring copartners. It is undoubtedly true, in the absence of any special agreement between copartners, as to the application of the partnership effects after dissolution, that a retiring partner retains a lien upon them to the extent of enforcing their application to the payment of the joint debts, and that creditors, though they have no lien on the property in their own right, are allowed in equity to assert a *quasi* lien by administering the equities between the partners themselves. But it is equally well settled that a retiring partner may relinquish this lien, in which case he has no equity through which the creditors of the firm can work out their own. By the transfer of the joint property to his copartner, and taking his personal contract and security for the payment of the joint debts, he discharges his lien and substitutes therefor the agreement of his copartner, to which he can alone look for his remedy, in case he is called on to pay the

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debts of the firm. There is no duty left on the property, but only a personal obligation by one copartner to pay the joint debts. The creditors in such case cannot rest upon the equity of the outgoing partner. Collyer on Part. § 894; Story on Part. § 359; *Ex parte Ruffin, ubi sup.*; *Ex parte Williams, ubi sup.* The transfer in the present case falls within this principle. Shaw, the retiring partner, relinquished all his right to the property of the firm, in consideration of a promise by Gardner to pay all the debts of the firm. Shaw, therefore, has no lien which can be enforced for the benefit of the joint creditors, upon the partnership effects. The property was transferred absolutely, discharged from any lien or trust, which would have attached to it in the absence of any special agreement between the partners respecting it.

The remaining question presented by the petitioners is, as to the right of the joint creditors of the firm to prove their debts against the separate estate of Gardner, and take dividends thereon *pari passu* with the separate creditors. This claim is founded upon the recognized exception to the general rule of applying joint estate to the payment of joint debts, and separate estate to the payment of separate debts, which has been established by the English courts in bankruptcy. That exception is, when there is no joint estate and no solvent partner, the joint creditors are allowed to prove and share equally with the separate creditors in the separate estate. It is a sufficient answer to this claim of the petitioners, that the statute of 1838, c. 163, § 21, recognizes no such exception to the rule therein prescribed for the distribution of the assets of insolvent debtors. The rule is distinct and peremptory, requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors. This provision was reported by the learned commissioners who drafted the insolvent act, and enacted by the legislature with a full knowledge of the exceptions which had been engrafted on the general rule of distribution by the course of judicial decisions in England. They designedly omitted them. We know of no rule of con-

struction by which we can now undertake to add them to the statute. The rule fixed by the statute may sometimes operate harshly, as all general rules do, but it is definite, clear, and easily applied. The exceptions to it are artificial and refined, leading to nice and subtle distinctions, and sometimes operating with great inequality and injustice. Indeed, it has been said by high authority, that the character of these exceptions has rendered the foundation of the general rule, as one of justice and equity, open to criticism and question, and difficult to be sustained. Story on Part. §§ 379, 382. Under such circumstances, we are unwilling to adopt it into our jurisprudence. The rule fixed by the statute must be adhered to. If there is no joint estate and no surplus of the separate estate after paying the separate debts, the creditors of the partnership can receive no dividend.

Such being the legal and equitable principles applicable to the case made by the petitioners before the commissioner of insolvency, it is clear that there is no ground for maintaining the petition.

Petition dismissed.

NOAH L. STRONG vs. PHINEAS STRONG.

When a submission to arbitrators is in the most general form, of all demands whatever, and there is an award of a certain sum of money as balance due from one to the other, it is a full execution of the submission.

If, under a particular submission, accompanied with a general submission, award be made concerning the particular things, and also for a money payment, the money payment will be intended to cover all other demands, unless the contrary appears.

Every reasonable intendment is to be made in favor of an award.

The rule of law, that, in order to be valid, an award must be certain and final, means, not that nothing shall remain to be done to complete the execution of the award, but that the things to be done shall be determined and defined to a reasonable certainty.

By the common law of Massachusetts, differing in this respect from the English common law, corruption or misbehavior, excess of authority, or gross errors or

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mistakes on the part of arbitrators, are pleadable in bar to an action on their award.

Partiality on the part of an arbitrator, unless expressly waived by the parties in the submission or otherwise, is a good defence to an action on the award.

To act as the agent of one of the parties regarding the matters in controversy, or to receive and act on *ex parte* representations or evidence, or otherwise permit undue influence from any quarter, constitutes such partiality as will invalidate an award.

Testimony as to declarations of an arbitrator, uttered *in pais* after the making of an award, is not competent evidence to impeach its validity.

Though, in general, an arbitrator cannot be received to impeach his own award, especially by declarations *in pais*, yet he may depose to facts which transpired at or during the arbitration, and which tend to show the award to be void for legal cause.

DEBT on a bond to perform an award. Five specifications of defence to the award were filed by the defendant, which are fully stated in the opinion of the court. The cause was tried in the common pleas, at the October term, 1851, before *Bishop, J.*, under whose rulings a verdict was found for the plaintiff, and the defendant excepted.

The material facts are stated in the opinion of the court.

CUSHING, J. This action, which is debt on a bond, conditioned to perform an award, comes before us on exceptions to the ruling of the court of common pleas.

The case finds that the plaintiff, Noah L. Strong, and the defendant, Phineas Strong, father of the plaintiff, occupied for many years, adjoining farms in Southampton, in this county, under a common management; that the two farms were stocked and worked, and the products taken and appropriated by the parties without any definite agreement as to the share of each; that in the year 1846, the defendant conveyed to the plaintiff an undivided half of a saw-mill and a grist-mill; that the defendant took the principal management of the grist-mill, and the plaintiff that of the saw-mill; that they generally shared in the earnings of said mills, but in what proportion did not appear; that each party took notes of his mill customers payable to himself; that two small books were kept at the saw-mill, containing amounts or memoranda of sawing, in one of which were entered charges against customers, some of which remained outstanding and unsettled at the time of the arbitration.

In this relation of the parties and of their business, differences arose, to adjust which, in the year 1849, mutual bonds, with similar conditions, were entered into, which bonds, after reciting that Noah L. Strong claims of Phineas Strong, payment for services rendered by Noah to Phineas, and of sundry sums of money paid, laid out and expended by Noah for the benefit of Phineas, Phineas claiming as against Noah that the demands of the latter had been satisfied by the conveyance of real estate to him, and also alleging an equitable claim to reimbursement of a part of the value of the real estate conveyed, then proceed to stipulate that the said differences between the parties, and all other demands which either has against the other, are submitted to the award and arbitration of Asahel Burge, Heman Searl, Luther Edwards, Strong Clark, and Alvan Bates, arbitrators, indifferently chosen by and between the parties, with covenant to abide by and perform the award of said arbitrators.

The arbitrators made their award in the same year to the following effect:—

First, they require the defendant to pay to the plaintiff the sum of fourteen hundred dollars in one year, with interest.

Secondly, they award that the grain of all kinds which has been grown or taken on or from the farms of the parties, shall be equally divided between them, and that the grain now sown or growing on said farms shall be equally divided between them at the time of harvesting the same. Also, that the farming tools and implements, including carts and wagons, shall be equally divided between them. Also, that the parties each shall hold the hay which is on their respective farms. Also, that each party hold the stock of cattle, horses and other animals, which they now claim or call their own, excepting one yoke of bulls, which shall belong to the said Phineas. Also, that the logs now lying in the mill-yard shall be equally divided between the parties. Also, that all debts due and owing from the said parties or either of them, contracted in the period since a certain date mentioned, to the present date, shall be paid equally between them. Also, that all debts due to the said parties standing upon their books of accounts,

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called the mill-book, charged during said period, shall belong to them in equal shares.

The present action is for the money payment in the award.

Of the five specifications of defence filed in the case, four consisted of assumed matters of ambiguity, uncertainty or defect, alleged to be either apparent upon the face of the award, or susceptible of being lawfully shown by parol evidence, as follows:—

1. That the arbitrators had not decided all the matters in difference, submitted to them.

2. That they had decided concerning matters not within the submission.

3. That the award is not sufficiently certain in specifying the rights and liabilities of the parties and the property which is to be affected thereby.

4. That the award is not in effect final.

At the trial it was ruled that the award is not invalid or void on account of any of these matters, and we are all of the same opinion.

We think the award, on the face of it, has the requisite conditions of competency of matter, certainty and finality, according to the principles of law as settled in other adjudicated cases.

In the first place, there is a specific award in relation to the main object of controversy, namely, the demands of the plaintiff for services and for money expended, and, by operation of law, of the demand of the defendant for reimbursement of a balance alleged on the conveyance of land.

As to this portion of the award, it was argued under the first specification of defence, that the award does not cover the demand for reimbursement, because that reimbursement, though expressly mentioned in the submission, is not expressly mentioned in the award; but we think that, in a submission of all demands, where money is claimed on either or both sides, an award between the parties of a balance to be paid by either, is a conclusion of the matter in controversy, without a detailed account or other statement of those matters; *Leavitt v. Comer*, 5 Cush. 129; *Shirley v. Shattuck*, 4 Cush. 470

Houston v. Pollard, 9 Met. 164; or to apply the language of the court in the case of *Bigelow v. Maynard*, 4 Cush. 317, the arbitrators, in finding the balance due to a party, do also necessarily find what deduction, if any, should be made for his claim, as certainly as if they had in express terms stated the sum which they deducted.

In this case, the arbitrators, in deciding that a balance was due to the plaintiff, in effect disposed of *all* money-claims of the defendant, and of course of the particular claim for reimbursement of money on account of the conveyance of land.

Where a submission is in the most general form, of all demands and controversies whatever, and there is an award of a certain sum of money as a balance due from the defendant to the plaintiff, it may well be taken as a full execution of the submission.

And, by parity of reasoning, if under a particular submission, accompanied with a general submission, certain specific things be awarded, and also payment of a certain sum of money, the money payment will be intended to cover all other demands unless the contrary appear. For the present is not the case of an action pending and all matters in difference referred, and an award to pay a sum of money without disposing of the action, which was properly held to be bad. See *Billing's Law of Awards*, 128-132. Here the award is perfectly susceptible of being so construed as to dispose completely of all the matters of difference whatsoever; especially if we bear in mind the rule that, according to the modern doctrine, every reasonable intendment is to be made in favor of an award, and it is sufficient to have it appear in the award with reasonable certainty what the rights of the parties are, so as to prevent future controversy and litigation for the ascertainment of those rights.

It was also argued, under the same specification, that, it being shown by parol that the subject of the notes heretofore spoken of was submitted for consideration by the parties at the hearing before the arbitrators, and the notes not being specially mentioned in the award, it is defective in that respect. But as the notes, held by either party, were on the face of

them payable to such party, and his property, unless by proof or award the contrary were shown, to abstain from all mention of them in the award, may well be construed as having the legal effect of leaving them as they previously stood, namely, the property of him in whose possession they might be.

Besides, the general consideration already stated, that courts will make no intendment for the purpose of overturning an award, applies here. It will be intended that arbitrators have decided all matters submitted to them, unless the contrary appears; and it is incumbent on the party who seeks to impeach an award, on the ground that it does not decide all the matters submitted, to show this. *Tallman v. Tallman*, 5 Cush. 325. Here, also, as in the case cited, all intendment to the contrary is precluded by the finding in the case, that the present arbitrators did in fact consider and intend to decide, and did decide so much of the depending difference between the parties as related to the notes; and the actual objection taken, as recognized in the agreement of counsel, is, not that the question of the notes was not decided by the arbitrators in fact, but that, in their award, they have not specially awarded thereon. We think the true and only question here is, whether the subject of the notes having been submitted to the arbitrators, it was actually decided by them, and whether the terms of the award will admit of such construction as to comprehend that decision. We think the award, considered as a whole, and in its due relation to the submission, is comprehensive enough to cover and conclude this particular subject-matter.

In the second place, in regard to other matters of common interest, the award proceeds to make partition of certain debts, credits and effects, between them in equal shares, as upon a dissolution of copartnership.

The second, third, and fourth specifications of defence apply to this part of the award.

Under the second specification, it is argued that the award goes beyond the submission, in providing for the payment of all debts due or owing from the said parties or either of them during a certain period; whereas it is found, among other things in the case proved by parol, that the arbitrators were

called to pass upon no matters except those in which the parties were jointly interested. But *non constat* that all the debts, owing from either party, were not shown before the arbitrators, by admission or other satisfactory evidence, to be matters of joint interest. Such proof would have been quite in consonance with what otherwise appears of the business relations of the parties.

In the case of *Shearer v. Handy*, 22 Pick. 417, which in some points resembles the present one, there was an agreement between mother and son, "to refer all their unsettled accounts" to three arbitrators, who awarded that the son should pay all the debts, and receive from the mother \$250, and half of their farm stock; the award was held to be not binding, because it manifestly exceeded the terms of the submission. Here the submission was of all depending differences, and the award is relieved from any objection of want of power in the arbitrators.

Under the third and fourth specifications, it is argued that the award is bad, for uncertainty in this point, and for defective determination of the rights and property awarded; and that the award is not final, as it leaves undivided, in fact, things which it purports to divide. But, in regard to all these points, we think the award is maintainable, as definitely prescribing a rule, by which the partnership property is to be divided; namely, that as to the cattle, excepting one pair specially transferred, they shall continue and remain the separate property of each, according to their previously understood ownership and possession; and that certain other chattels, together with debts and book credits, shall be divided and assigned equally between the parties.

It is true, the arbitrators do not themselves actually sever the things to be divided, whether hay, grain, utensils or logs. There is nothing in the submission which requires them to effect such actual severance and manual distribution of these things. They adjudge and award that the things shall be divided, and they decide in what proportions. In many cases, no more is possible to be done; as of an award for the division of partnership effects, which may happen at the time to be

abroad, or otherwise not in the personal possession of either party, and of which the quantity or value is not known; or, as in the case of an award concerning objects, not in their nature presently divisible, but hereafter susceptible of division, such as the yet immature crop of a fruit tree; or, as in the case of joint interests not in their nature capable at any time of material severance, like the property in a ship. All these, and many other examples which readily suggest themselves, would seem to show that an award, which purports to divide property between two persons, by prescribing a rule of division, may well be final, though the property in question be not actually divided, nay, though it be incapable of actual division. If the award give a definite and certain rule for the division, there is no want of power in the laws to apply the rule and enforce its application.

Though possible doubt may attach to the doctrine, by reason of *dicta* in some late English cases, (see the cases collected in Billing on Awards, pp. 135, 136, note e,) yet, on the whole, it is admitted in those very cases, that if the arbitrator makes "some regulations upon the matters of difference," to use the words of baron Parke, or "gives direction" as to what is to be done, according to the language of lord Abinger, it is decisive in favor of the award. An award is final when it is an absolute conclusive adjudication of the matters in dispute. *Karthauss v. Ferrer*, 1 Peters, 230.

When it is laid down as a principle of law that an award should be final, the meaning is, not that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined to a reasonable certainty. Thus, an award is bad which requires A to give bonds to B, with such sureties as B shall approve, because that commits every thing to the discretion of B. Com. Dig. Arb. E. 15. But an award that the property of a pump is in A, and that B has a right to use it, and that it shall be repaired at their joint expense, has been adjudged to be final. *Boodle v. Davies*, 3 Ad. & El. 200. Yet in this last-named case many things remained to be done to give effectual execution to the award, about which things it was

quite possible for litigation to arise. But the respective rights of the parties being determined by the award, it is to be taken as valid, for the law furnishes the appropriate remedies for the enforcement of those rights.

Indeed, in all this second part of the award before us, to which the second, third, and fourth specifications of defence apply, it may be easy to imagine how a greater degree of precision might have been attained by the arbitrators in expressing their will; and if it were the case of an award subject to recommitment, we might look at it with a more critical eye; but we are not prepared to say that, in these particulars, the award is not final, or is so indefinite and uncertain as to be incapable of execution, and, therefore, absolutely void. And the general view which we take of this case relieves us from the necessity of inquiring into the questions of admissibility of evidence raised on this part of the record.

But we cannot so readily dispose of the fifth specification, which alleges that Luther Edwards, one of the arbitrators, was not a disinterested person, and had, in making the award, conducted himself with partiality to the plaintiff.

This specification involves the question, of how far the validity of an award is affected by sentiments or acts of partiality on the part of an arbitrator; and also the question upon the facts and arguments in the present case, in what manner, if such partiality be alleged, it shall be proved.

It seems to be thoroughly settled in this commonwealth as well as in England, in accordance with the doctrine of the civil law and of natural justice, that corruption or fraud, *si quid dolo in ea re factum sit*, if lawfully shown, will set aside an award; and in this commonwealth it is a good defence to a suit on the award.

Thus, in the case of *Brown v. Bellows*, 4 Pick. 179, this court has declared that an award may be set aside for fraud, clear mistake, or corruption; or, as it is otherwise stated in the same case, if there be proof of fraud, corruption, or misbehavior of the arbitrators.

In the case of *Bean v. Farnham*, 6 Pick. 269, the invalidity

of an award, by reason of misbehavior of the arbitrators, is recognized, and the court indicate the nature of the remedy under the common law of this commonwealth, Dane's Abr. ch. xiii. art. 4; according to which, differing in this respect from the English common law, corruption of the arbitrators, excess of authority, or gross errors and mistakes in the award, are pleadable in defence to an action on the award; which innovation in pleading grew out of our courts not possessing the full powers of courts of chancery in England.

In the case of *The Boston Water Power Co. v. Gray*, 6 Met. 131, the court define the conditions of law or fact, in which the court will set aside an award upon matters not arising out of the submission or award, to be when there "is some corruption, partiality, or misconduct on the part of the arbitrators, or some fraud or imposition on the part of the party attempting to set up the award, by means of which the arbitrators were deceived or misled;" and an award may undoubtedly be impeached and avoided by proof of fraud, provided it be fraud practised upon or by the referees.

In the later case of *Withington v. Warren*, 10 Met. 431, where an award was sustained, although proof was offered that one of the arbitrators had, upon the statement of the chairman that it was right, signed the award without reading it, or knowing its contents; yet it was admitted, that if it could have been shown that the arbitrator was induced by some false representation, fraud, or misconduct, to sign a different award from that which he intended, this would have been fatal. Without multiplying authors on this point, it suffices to refer to the carefully expressed instructions of the judge (Chief Justice Shaw) to the jury in the case of *The Boston Water Power Co. v. Gray*, and the decision of the whole court thereon, to establish the position that corruption, fraud, or misconduct is decisive against an award.

If, therefore, in the present case, fraud and corruption were distinctly alleged or plainly appeared on the face of the proofs, there would be no room for question or doubt as to the matters to be decided by this court.

But nearly all the authorities cited speak also of misconduct

or misbehavior of the arbitrator, as invalidating an award. And, if so, can there be any grave cause of doubt when the thing alleged is undue influence of a party attempted or exercised, upon one or more of the arbitrators, especially if the arbitrator or arbitrators yield to that influence? Is not that rightly to be deemed misconduct or misbehavior on the part of an arbitrator? We cannot but think so. We have no hesitation in expressing our opinion of the impropriety and unfitness, to say the least, of any *ex parte* representations being received by an arbitrator, during an arbitration, from either of the parties to the controversy.

To judge of the true bearings of the fact, it is only necessary to reflect on the relation and character of arbitrators. Like jurors impanelled for the trial of a cause, or judges on the bench, they are invested, *pro hac vice*, with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality. And a judge, a juror, an arbitrator, a commissioner of partition, should not only possess the quality of impartiality in fact, and have the conscience of it in the given case, he should, moreover, sedulously shun all the possibilities even of insensible bias. Nor is it enough, for any person thus appointed to decide the conflicting rights of others, to be animated with the purpose of conscientious decision, and to decide, in fact, according to the law and the truth of the case. A judge ought to place and keep himself beyond the suspicion of dishonorable influences. Though his judgment of the pending controversy be altogether a just one, yet he is false to his duty if he expose his mind to the chance or danger of perversion. It was held, and rightfully so, to be no defence or justification of the conduct of a judge, who was in many respects the greatest and wisest man of his day, Sir Francis Bacon, that his decision was adverse to the party from whom he received a gift, bestowed for the purpose of conciliating his favor. 2 Camp. Lives of the Lord Ch. 2d Am. ed. 336. For the moral influence of judicial decisions is to be guarded, as well as the rightfulness of the judgment in the given case. And although an arbitrator has only special, and often very limited and narrow duties, and is not

assumed to possess all the general conditions of a judge, and is not under oath like a juror, yet the analogy of his duties remains the same as if he were appointed by the highest public authority, or sworn to impartiality of judgment. *Compromissum ad similitudinem judiciorum redigitur*, says the Digest. In accordance with which it is that the law gives to an arbitrator some of the immunities of a judge. Thus, it protects him, in general, from question as to the grounds of his judgment; 1 Greenl. Ev. § 249; and from personal responsibility for errors which he may honestly commit. Billing's Law of Awards, pp. 103, 104.

In a word, the duties of an arbitrator being *quasi* judicial, his judgment, and his deportment in the powers of judgment, are to be considered and tested by the *criteria* of impartiality, which apply to the general subject-matter, and which the first principles of rational justice dictate and prescribe.

There is nothing singular in the conclusion here suggested, of influences in themselves undue, but altogether short of corruption, being so applied to the mind of another as to impair the validity of an act otherwise lawful. The question, which sometimes arises upon contested wills, is an obvious and pertinent illustration of the general idea. 1 Jarman on Wills, by Perkins, c. 3.

This obvious legal conclusion of this doctrine has not been affirmed as yet by any decision of this court, nor has the contrary been adjudged; hence it may be assumed as an open question. But it seems to be well settled in England, whether at common law or in equity.

The *St.* of 9 & 10 Wm. 3, c. 15, which authorizes submission to arbitration to be made by rule of court, provides for setting an award aside when it shall appear that the arbitrators "misbehaved themselves," and that the award "was procured by corruption or undue means," or, as it is otherwise described in the act, "by corruption or undue practice." Bac. Abr. Arb. B.

The provisions of this act are special ones; and the power to set aside an award under it can be exercised only in the case of a rule of court, and it would seem only by the court

granting the rule. 2 Story, Eq. Jur. § 1450, note; § 1452, note.

And, at common law, fraud, partiality, misconduct, is not pleadable to an action on an award. Kyd on Awards, ch. 7, p. 227. But these peculiarities of jurisdiction do not affect the question of principle as to what is misbehavior on the part of arbitrators.

Lord Hardwicke set aside an award in an early case, as being unfairly obtained. *Ives v. Medcalfe*, 1 Atk. 64. See also *Burton v. Knight*, 2 Vern. 514.

Lord Thurlow, in a subsequent case, said that an arbitrator should be indifferent; for, by considering himself as the agent of the person appointing him, he acts against good faith and breaks a most solemn engagement. *Calcraft v. Roebuck*, 1 Ves. Jr. 227.

The leading modern case is that of *Walker v. Frobisher*, decided by Lord Eldon, 6 Ves. 70; to the effect, that if an arbitrator receive any evidence *ex parte* and irregularly, it is against general principles, and is fatal to the award.

In so deciding, Lord Eldon did but follow an already strong *set* of legal opinions. The greater prevalence of arbitration in modern times, while it has led the courts to adopt more liberality of construction regarding defects of mere form or honest errors, (see *Peters v. Peirce*, 8 Mass. 398,) has, at the same time, been followed by more strictness of judgment as to the character and conduct of arbitrators in the relation of impartiality and integrity, both in the equity and the common law tribunals.

The doctrine in the case of *Walker v. Frobisher*, was afterwards affirmed by Lord Eldon himself in *Featherstone v. Cooper*, 9 Ves. 67, in which case he says, that arbitrators must understand "that they are acting corruptly, acting as agents; and that their award ought to be set aside, where they take instructions or talk with one party in the absence of the other." The same doctrine has been recognized as a sound principle by the courts of common law in England. Thus, if an arbitrator examine one of the parties or his witnesses, without notice to the opposite party, the award will

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be set aside. *In re Hick*, 8 Taunt. 694. So where an arbitrator questions a witness, and receives statements from him in the absence and without the consent of one party to the reference. *Dobson v. Groves*, 6 Adol. & El. N. S. 637. So, when the arbitrators, by agreement together, examined a witness each separately from the other, and in the absence of the parties, the court held the course pursued to be contrary to natural justice, and to vitiate the award. *In re Plews*, 6 Adol. & El. N. S. 845. In these cases the rule of impartiality, of exact justice, and of punctilious adherence to all its requisitions, is laid down as the law to guide the conduct of arbitrators.

And though, therefore, arbitrators be nominated, one by each party, still, they are not to consider themselves as representing separate parties, and the advocates of opposite sides; but as called on to execute a joint trust, and to look impartially, at the true merits of the matter submitted to their judgment. Caldwell on Arbitration, p. 51.

In this commonwealth, with a jurisprudence emphatically eclectic in its character, drawing both rights and remedies almost indifferently from either common law or equity, as the interests of justice may require, it has been held theoretically that arbitrators ought to be indifferent and impartial, both in sentiment and in action. *Fox v. Hazleton*, 10 Pick. 275.

If, indeed, parties in controversy choose to waive the right of impartial trial, and purposely and avowedly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending, will not set aside the award, merely because of the character of the arbitrators. But if parties really intend to have their rights decided by impartial judges, they are entitled to insist that each and all of them be impartial. Therefore, proof of bias and strong partiality on the part of an arbitrator, would form a serious objection to the acceptance of an award. It would be no valid answer to the objection, that such referee did not discover undue partiality in the deliberations of the referees, and made no unusual exertion to influence their minds, because it

is impossible to determine to what extent their judgment might have reposed on his reasonings and suggestions, or how far their decisions were influenced by him.

Such is the deliberate opinion of this court as expressed in the case of *Fox v. Hazleton*, 10 Pick. 275. It remains only, as the natural complement of this opinion, to decide that arbitrators appointed indifferently as impartial men, shall, in the true spirit of impartiality, hold themselves beyond the improper interference of either party, or undue influence from any quarter.

We are the more disposed to state unequivocally the conclusions to which we have arrived on the whole matter, for the reason that, as the case itself suggests the irregular interference by a party, and the consequent exercise of influence by him over the mind of an arbitrator, with or without actual prejudice to the rights or interests of the other party,—under these circumstances, not to condemn in principle such interference, and such exercise of influence, would be impliedly to sanction it, and to leave it to the indirect sanction of this court. If any such interposition has been practised in arbitrations heretofore, under impression, on the part either of arbitrators or of litigants, that such interposition is not wrong, it is time this impression should be corrected, and sounder notions of right be communicated to the public mind. It is not to be permitted that so much as the shadow of a spot shall tarnish the unsullied purity of the justice of this commonwealth.

We conclude, therefore, that not corruption or fraud only in an arbitration, but also the exercise of undue or improper influence, applied by one of the parties to one or more of the arbitrators, by separate conference, or other ways of approach, is a lawful defence to an action on the award; and applying this conclusion of law and the doctrine it embraces, to the case before us, we feel constrained to order a new trial upon the single issue of the matters embraced in the fifth specification of defence, which, in our judgment, is a fit question for the consideration of the jury.

But, as the record shows that a verdict was taken in the

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court below on one point, namely, the alleged assent of the defendant to the award, and as our opinion disposes of all the other questions in the case, a new trial is granted upon the condition only, that the defendant will take no exception to the award, save on the single question presented by the fifth specification ; and, as well to prevent mistakes on this point as for other sufficient reasons, the new trial will be had in this court.

Objection was taken below, on the assumption that the refusal of the plaintiff to allow the defendant after the making of the award, and before action brought, to inspect or take the mill-books, is pleadable in law to this action ; but we think it was rightly ruled by the court of common pleas, that the defendant's remedy for such alleged refusal is upon his bond.

We do not propose, in the present position of the case, to go into or even touch the evidence adduced, bearing on the question of the imputed partiality of Edwards. That is the very inquiry upon which the jury is to pass, and as to which we have not formed, and of course do not express, any opinion.

The case finds, however, that Edwards himself, the arbitrator, whose partiality is impeached, and two other witnesses, Phineas Strong, Jr., and Lyman Strong, were called to give evidence on that part of the subject ; and we think it necessary to say we do not readily perceive how the evidence of Phineas Strong, Jr., and Lyman Strong, came to be competent. They testify to *post litem* declarations of Edwards, one of the arbitrators. Is not this, in any view of it, as between the plaintiff and defendant, hearsay evidence ? If the question were of an action of any sort against Edwards himself, provided any such be possible, as for instance in the analogous case of the impeachment of a judge, we conceive that his declarations, admitting improper influences in the decision of a case, would be evidence, whenever and wherever uttered by him. There may possibly be proceedings in equity, in which this evidence would be admitted in such a relation as the present. But we cannot think it competent in this

case, according to any rule of proceeding or evidence at common law.

Indeed, on a first view of the subject, we entertained some doubts of the admissibility of the testimony of Edwards himself. But the admission of such evidence seems to be required by the necessities of justice. It is received without challenge, (see *in re Hick*, 8 Taunt. 694,) in the English courts. And though the general doctrine be that an arbitrator cannot be suffered to impeach his own award, *Bigelow v. Maynard*, 4 Cush. 317; especially by declarations *in pais*, yet, in cases like the present, this court, in sittings at *Nisi Prius*, has admitted the arbitrators to depose to facts, which transpired at or during the arbitration, tending to show the award to be void for legal cause, (see *Boston Water Power Co. v. Gray*, 6 Met. 131, *cor.* Shaw, Ch. J.; *Winsor v. Griggs*, 5 Cush. 210, *cor.* Bigelow, J.) and we think it was correctly done. 2 Greenl. Ev. § 78.

Exceptions sustained; new trial in this court.

C. Delano, for the defendant.

C. P. Huntington, for the plaintiff.

HOLYOKE BANK *vs.* GOODMAN PAPER MANUFACTURING COMPANY & others.

The St. 1851, c. 315, § 1, requiring a summons to be left with a stockholder of a corporation, before his property can be taken on execution against the corporation, does not require any change in the writ or declaration, from the form before adopted in a suit against such corporation.

In an action against a corporation and some of its stockholders, seeking to charge them individually, mere irregularities in the mode of becoming stockholders cannot avail such individuals, if the corporation had waived such informalities, and recognized them as legal stockholders.

In such action, if the corporation admit its own liability by a default, a stockholder cannot in his own defence, even since the St. 1851, c. 315, deny such liability.

Where several stockholders in a corporation are summoned to answer in a suit against the corporation, pursuant to St. 1851, c. 315, § 1, and severally deny their liability they are not entitled to a separate trial by different juries.

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THIS action was commenced in the court of common pleas, on a promissory note signed by J. W. Goodman, as agent for, and on behalf of the Goodman Paper Manufacturing Company, a corporation, payable to his own order, and by him indorsed as treasurer to the plaintiff. The plaintiff also summoned in said action, pursuant to St. 1851, c. 315, Alonzo Lamb, Thomas H. Moody, and Horace Jenks, as stockholders in said corporation, by a summons in the usual form, addressed to them and the corporation, but no allusion was made to them in the writ or declaration. The corporation was defaulted at the first term in the common pleas, and no question arises as to the corporation, but the individual defendants moved to dismiss the action as to them, because they were not named in the writ. That motion was overruled, and the action was removed to this court upon affidavit, pursuant to St. 1840, c. 87, § 3, where the motion to dismiss was renewed and again overruled. Each individual then pleaded separately their non-liability to the plaintiffs upon the cause of action set forth, and specified: 1. That they were not stockholders in said corporation. 2. That said note was not the note of the corporation and not binding upon them. 3. That the officers of said corporation were able to pay said note, and were liable for the same to the exclusion of mere private stockholders; and also certain other defences, involving questions of fact, which were found by the jury in favor of the plaintiffs, and on which no question of law now arises. The defendants requested separate trials, which the presiding judge, *Dewey, J.*, refused, and they were all tried by the same jury, at the same time. The facts in relation to the first specification of defence sufficiently appear in the opinion of the court, and the evidence bearing upon the question of the liability of the corporation itself for the note, did not become material in the final disposition of the cause; and the third specification of defence was overruled by the presiding judge. By the agreement of parties, the points not passed upon by the jury were reported to the whole court, to decide whether upon the facts stated, and the inferences to be drawn from them, a jury would be author-

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ized to find a verdict for the plaintiffs; if so, judgment to be entered for the plaintiffs; otherwise a nonsuit.

C. P. Huntington, for the plaintiffs.

W. Bowdoin, for Lamb and Moody.

H. Morris, for Jenks.

DEWEY, J. The present action was instituted against the Goodman Paper Manufacturing Company, a corporation doing business in the town of South Hadley, to recover a promissory note of \$1,500, dated March 17, 1851, payable in four months, signed by J. W. Goodman, agent, payable to his own order, and by him indorsed as treasurer of the company

The writ was duly served on the corporation, and they made no defence, but suffered judgment by default.

At the request and under the direction of the plaintiffs, the officer who served the process upon the corporation, also served upon Alonzo Lamb, Thomas H. Moody, and Horace Jenks, severally, a summons as stockholders in said corporation. This summons was in each case directed to the corporation, and to the individuals above named, and was in the usual form of a separate summons to be served after an attachment of goods, or estate. There was nothing in the writ or declaration describing these individuals, or alleging that they were stockholders in the corporation, or giving any direction to the officer to serve the precept upon them.

The defendants, Lamb, Moody, and Jenks, at the first term severally moved that the action might be dismissed as to them, they not being properly parties, because the writ did not authorize any such service on them.

The court refused to dismiss the action as to these parties, and the correctness of that ruling presents the first point raised in the present case. This question is new, and arises under the recent statute of 1851, c. 315, § 1, providing that "the person or property of any stockholder in a manufacturing corporation, shall not be hereafter taken upon any execution issued against such corporation, unless a summons in the action was left with said stockholder." Prior to this statute, and under the Rev. Sts. c. 39, § 30, wherever such liability attached to the stockholders of a manufacturing company, to

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pay the debts of the company, their persons and property might be legally taken on any writ of attachment or execution issued against the company. The proceeding was, as to the writ and execution, wholly a proceeding against the corporation, upon whom alone service was required to be made, and who alone could appear and defend the suit.

The statute of 1851, *c.* 315, requires a summons in the action to be left with the stockholder also, if the creditor would levy upon the property or body of such stockholder as liable individually. This statute requires in terms nothing more than a summons to be left with the stockholder. It prescribes no change in the form of the writ, or any recitals in the same that certain persons are stockholders, or that the stockholders are individually liable for the debts of the corporation.

In the naked manner in which the statute has left the mode of summoning individual stockholders, in a suit against the corporation, and in the absence of any rule of the court prescribing the forms of proceeding in such cases, and considering the former practice of proceeding solely against the corporation, we think the objection taken here to the form of summoning individual stockholders cannot avail.

By Rev. Sts. *c.* 90, § 8, the forms of writs in civil actions shall be the same as heretofore established by law, and by the usage and practice of the courts; but alterations may be made or allowed by the courts when necessary to adapt them to changes in the law. The carrying into effect the provisions of the statute of 1851, *c.* 315, may, in the view of the court, justify and require a new form to be prescribed for the process that is to be issued in cases like the present. A very natural and appropriate form for such a suit, is found in the prescribed form of writs of foreign attachment or trustee process, as it is usually called, wherein, after the usual recitals and allegations charging the principal defendant, the plaintiff further alleges that A. B., (the supposed trustee,) has in his hands the goods, effects, and credits of the principal debtor, and the officer is ordered to summon the trustee to appear, &c. A similar form here, with the proper changes in the allegations,

would be well adapted to present the whole matter in an orderly form.

2. The next question is, whether the persons thus summoned in the case were stockholders in this corporation?

If they were so, it is conceded that they have incurred the liability which attaches to individual stockholders by reason of the neglect of the corporation to have the whole amount of their capital stock paid in, and a proper certificate thereof filed, and recorded in the registry of deeds; and also by reason of the failure to give notice annually in some newspaper printed in the county, of the amount of existing debts, &c., as required in Rev. Sts. c. 38, §§ 16, 17, 22.

The cases of Lamb and Moody present similar objections and may be considered together. The plaintiffs produced the stock books of the corporation, on which were borne entries of the following tenor, "February 26, 1851. Be it known that Alonzo Lamb, of South Hadley, is proprietor of fifteen shares of the capital stock of The Goodman Paper Manufacturing Company, subject to their by-laws, the shares being transferable by the clerk on the company's books on producing this certificate.

J. W. GOODMAN, Clerk."

Similar copies of certificates were entered on the same books of the shares holden by Moody, and in both cases on the call of the plaintiffs the originals were produced by the parties holding them. Neither of these parties were original subscribers for stock, but held under purchases from prior stockholders, whose certificates had been surrendered prior to issuing those to the defendants. It was insisted on the part of these defendants that these certificates did not show any membership in the company, first, because there was no written instrument of transfer to them from the prior party holding the stock, such as required by Rev. Sts. c. 38, § 12, and St. 1846, c. 45; second, because the certificates described no particular shares of stock by numbers, as required by c. 38, § 10, and were not subscribed by the treasurer of the corporation.

If the question had arisen in another form, as for instance, if Lamb and Moody had claimed to be admitted as stockholders, and entitled to have their names so entered on the

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books of the corporation and to receive dividends, and the corporation had refused to acknowledge them as such, or to pay these dividends, because of the want of a proper transfer from the prior owner of the shares, a different question would be presented for our consideration. But the facts show this to be a case where the corporation has conceded the correctness of the transfer from the prior owner; has accepted the defendants as legal stockholders; has entered their names on the stock books as such, and given them all the privileges of stockholders. The objections for want of a more formal transfer were waived by the corporation by issuing certificates and entering their names on the stock books as members, with the number of shares held by them, and this having been done with the concurrence, and at the request of Lamb and Moody, they must now be taken to be stockholders for the purpose of liabilities, as well as sharing in the anticipated profits to be divided among the members.

As to Jenks, the other defendant, he was a subscriber to the original stock, as appears by his subscription on the books of the corporation, and by the stock book was shown to be a member by an entry of his being such, and of the number of shares held by him, and he was also a director in the company, all which are quite sufficient to show his membership.

All these individuals are therefore shown to have been members on the 17th of March, 1851, and they continued to be such to the time of the commencement of the present action. Being members at the time of the making of the contract, and at the time of the institution of this suit, the case does not present any question as to what period of membership in reference to a particular debt a liability attaches.

3. The stockholders thus summoned, further contend, that the plaintiffs have no legal ground of action upon the note in controversy, as against the corporation.

They specify two grounds of defence as to the note. First, that it was executed by the agent, without any legal authority from the corporation to bind them. Second, that the note was discounted by the plaintiffs in violation of the banking laws of this commonwealth.

With a view of presenting the case fully for the whole court, this latter question was submitted upon the evidence to the jury, who found their verdict upon that point in favor of the plaintiffs.

Upon the other question, that of the authority of Goodman, the agent, to make and indorse this note, the facts were not controverted, and the question was one of the legal effect of these agreed facts, and that question the defendants seek now to raise, and they insist upon their right to a defence of the action upon an issue involving the general question of liability of the corporation upon this note, although the corporation itself admit their liability, and submit to a judgment against them by default.

Is this line of defence open to a stockholder, where, in an action against a manufacturing corporation, a summons in the action has been left with such stockholder, under the provisions of *St. 1851, c. 315*?

The first obvious remark is, that such defence by an individual stockholder, or member of any corporation, or a *quasi* corporation even, has not been allowed under the decisions and practice of this court prior to the enactment of the statute. It is the corporate body that is to defend suits brought against it, and not for individual members of the corporation to do it. *Lane v. School District in Weymouth*, 10 Met. 462, is direct to this point, and was only declaring a well known rule of law.

If the right now urged by the stockholders to open the defence generally to the action, as the corporation itself might do, can be maintained at all, it must be wholly under the provisions of the statute of 1851, c. 315. In § 1, it provides for leaving a summons in the action with the stockholders. § 2. "Any stockholder with whom such summons has been left shall be admitted to defend in any such action; and if it shall appear that he is not liable therein, judgment for him shall be entered upon the issue joined, and for his costs; and judgment may be entered in the same action against the said corporation, for damages and costs as upon a default." Does this provision authorize a general defence to

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the action? In construing this new statute, it is proper to look at it as a remedial statute and ascertain what were the existing evils that may be reasonably supposed led to the enacting of a new law. The law had long existed in various forms, creating liabilities on the part of the stockholders of manufacturing corporations, for the debts of the corporation, and providing in certain cases for a levy of the execution against such corporation upon the body or property of its members. The law had presented no new or other forms of proceeding than the ordinary service on the corporation, and the obtaining a judgment against the corporation—with the execution issued upon such judgment, the creditor proceeded at once to levy upon the body, or property of a member of the company. But who were members, and how was this to be known? Practically it came to this, that the creditor directed the officer to levy upon the body or property of any individual whom he alleged to be a member of the corporation, subject of course to liability to an action, if he levied on one not a member. But this mode of proceeding gave no previous opportunity to the party to be heard on the question of his membership, and required the officer to levy upon any member, as he was directed by the creditor, without any thing in his process to guide him, as to this or that individual person. It was earnestly contended for a time that such a levy upon an individual stockholder, without previous proceedings against him, without any hearing, or adjudication as to his membership, was in violation of the fundamental rights secured to the citizen by the constitution.

That argument did not avail, and the law came to be well settled that in those cases where liability attached to individual members of a corporation for the debts of the corporation, a judgment and execution against the corporation alone, was sufficient authority to justify a levy on the body or property of the individual member. *Marcy v. Clark*, 17 Mass. 331. There was we perceive a mischief supposed to exist, and one which might induce the legislature to enact the law of 1851, c. 315. It was a sufficient reason for requiring a summons to be left with the stockholder that he might thus be

notified of the pendency of the action as well as for the further provision of the act that "such stockholder may be admitted to defend in any such action, and if it shall appear that he is not liable therein, judgment for him shall be entered upon the issue joined." As it seems to us, the supposed grievance to be remedied, and the provisions of the statute as to the defence by the stockholder, alike concur in leading to the result that the new remedy herein provided was that of giving the party the right to a hearing and adjudication upon the question of his being a member of the company, before a levy could be made upon his body, or property. Every defence bearing upon the question of his membership is open to him, if he elects to appear and contest it. If he does not so appear after a summons shall have been left with him, he voluntarily submits to any liability which may legally attach to him as such member. Beyond this, we think the statute does not contemplate a defence by him individually. The right to maintain the action against the corporation, is left as before, to be defended by the corporation itself, and not by an individual member.

Taking this to be a correct view of the subject, it was not open to the defendants, Lamb, Moody, and Jenks, to raise any question as to the liability of the corporation upon this note of hand executed by one claiming to be their authorized agent. The corporation by their default admitted the validity of the contract, and their liability upon it. That authorizes a judgment and execution therefor against the corporation, and the further inquiry open to the defendants was that of their liability as members of the company for the payment of a judgment against the corporation. The facts stated establishing such membership, the judgment is to be rendered against them on the issue as to membership.

4. Another suggestion of a different character was made; that under the third section of this act, the property of the officers of the company must be first taken, if any, and if no such be found, then alone the property of the stockholders is liable to be taken. It is not necessary for us, in the present state of the case, to express any opinion as to the effect of this

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section, whether it be merely cumulative, or what was its object and scope.

5. It was insisted on the part of the three defendants severally summoned in the case, that they had a legal right to separate trials before distinct juries. This was overruled by the presiding judge, and as we think correctly. It is true, the question of membership of each of these persons is a distinct question to be settled by the jury, but it no more requires separate trials for that reason, than many other cases that will readily occur. Take the case of an action in which several different individuals are sought to be charged as secret partners. The liability of each is to be separately established, but the evidence as to the whole case is to be submitted to one jury. So in the ordinary cases of trespasses, or other torts, alleged to have been committed by sundry individuals, each one is individually to be shown to have participated, and the case of one may differ from the others in mode of proof, but this does not authorize the demanding of a separate trial, as a matter of right. The whole case was therefore properly put to one jury. The result is, therefore, that upon the issue open to the parties Lamb, Moody, and Jenks, that of membership, they must be adjudged to have been members of the Goodman Paper Manufacturing Company.

Judgment for the plaintiffs.

INHABITANTS OF CUMMINGTON vs. INHABITANTS OF WAREHAM
SAME vs. SAME.

A town, whose overseers of the poor send a lunatic pauper to the State Hospital, without an adjudication by any court or magistrate, may nevertheless recover their payments for his support, of the town of his legal settlement, under St. 1841, c. 77.

Such a sending is a "commitment" of the pauper within the meaning of that statute.

In an action for such expenses, by the town committing such lunatic pauper, against the town of his settlement, no recovery can be had for expenses incurred more than two years previous to the commencement of the action, nor more than three months' previous to notice to the defendant town.

THESE two actions were for the expenses of supporting a lunatic pauper at the Worcester hospital. The first was tried before *Hoar, J.*, in the court of common pleas, under whose rulings a verdict was returned for the plaintiffs; and the defendants filed a bill of exceptions. It was argued in this court, as of the September Term, 1851. The second was submitted to the court upon an agreed statement of facts, and the defendants appealed to this court. The facts in both cases are sufficiently disclosed in the opinion of the court.

C. P. Huntington, for the plaintiffs.

S. Miller, Jr., for the defendants, in the first case, and

C. Delano, in the second case.

SHAW, C. J. Two actions having been brought between these parties, in regard to the support of the same pauper, it is convenient to report them together. The first was brought to recover for expenses incurred for the support of John Swift, alleged by the plaintiffs to have his settlement in Wareham; such expenses having been incurred by the plaintiff town, by payment of the same to the State lunatic hospital. The action was commenced 15th January, 1850, on a claim for the support of said pauper, at the hospital, as an insane person, from 15th December, 1848, to the commencement of the action; and it alleges notice to the plaintiffs within three months from the time of incurring the expense. The case was tried in the court of common pleas, for this county, at the October term, 1850, and a verdict returned for the plaintiffs; and it comes before this court on exceptions taken by the defendants. It appears by the facts stated in the bill of exceptions, that the said John Swift was sent to said hospital by the overseers of the poor of Cummington, on the 2d December, 1844, without giving notice to the town of Wareham, and without any adjudication of any court or magistrate. It was admitted that the overseers of Cummington, on the 15th March, 1849, sent legal notice to the overseers of Wareham, as required in cases of paupers, and that on the 22d March, 1849, the latter sent a legal answer to the former, denying the settlement of said pauper in Wareham. It does not appear in this suit that any other notice was given; and it will be perceived

that though the pauper was sent to the hospital some years previous, the claim is limited to a period commencing three months next preceding the date of the above notice.

The question of settlement was left to the jury; but the defendants contended and requested the court to instruct the jury that even if the settlement of the pauper was in Wareham, this action could not be maintained, because there had been no such commitment of Swift to the hospital, as would make the defendants liable in this action. But the judge overruled the objection, and directed the jury, that if they should find the legal settlement of the pauper to be in Wareham, they should find for the plaintiffs, which they did. The question is upon the correctness of this direction.

The action is founded on *St.* 1841, *c.* 77, which provides, that whenever any lunatic or insane person shall be committed to the State lunatic hospital, from any town in which he has not a legal settlement, and such town shall pay the expense of his support at the hospital, such town may recover from the town in which he has a legal settlement, the full amount of all the expense so paid.

The case of the plaintiff town is within the letter of the statute, if the sending of a lunatic pauper to the hospital by overseers, for relief and support, is a "commitment" within its meaning. But it is now insisted, as it was at the trial, that "committed" in this statute applies only to lunatics sent to the hospital by some court, magistrate or judicial authority, under various provisions of law.

As this transaction took place long after the revised statutes went into operation, and all the statutes on the subject which preceded them were repealed, we are to look to them for the law, and the antecedent statutes can be resorted to only for purposes of illustration and exposition.

By *Rev. Sts. c.* 48, § 8, it is provided that any lunatic supported as a town pauper, may, with the consent of the trustees, be committed to the hospital, by the overseers of his town, and shall be kept for a sum, &c. Here the act of sending the pauper to the hospital, by the overseers, is called a "commitment." "His town" in this clause is manifestly the town

where he is supported, whether that of his settlement or not, because towns are bound to support all paupers, sane or insane, being in distress and in need of immediate relief therein, whether they have a legal settlement in such town or not.

Here is an express provision, that in case of this dangerous class of paupers, towns may avail themselves of the ample and appropriate accommodations of the hospital, instead of their own, being liable for the expense as before. It is doubtful, whether by force of any provision of the revised statutes, the town incurring that expense, if not that of the pauper's settlement, has a remedy even for reimbursement. By § 9, following the one last cited, it is provided that the expenses of the hospital for the support of lunatics committed by any court or judicial officers, or by virtue of the proclamation of the governor, shall be paid by the town of their "settlement," and it gives an action against such town, in the name of the treasurer of the hospital, to recover such expenses. This was manifestly a mistake, and we shall refer to it hereafter.

By the next succeeding section, it is provided that every town, paying expenses for the support of any lunatic under the provisions of the preceding section, shall have the like remedies, &c. This seems to limit the right of reimbursement from the town of settlement, to cases of expense of judicial commitment.

We have said that "settlement," in § 9, was probably a mistake. It probably arose from the fact that the revised statutes embodied to some extent the provisions of two previous *Sts.* 1834, c. 150, § 7, and 1835, c. 129, § 2, some of which gave the hospital a remedy against the town of settlement, and others against the town of residence. But what proves it a mistake, is the *St.* 1837, c. 228, § 7, passed within a year after the revised statutes, in which it is enacted that the word "settlement," in the 9th section, shall be construed and taken to mean "residence," in all adjudications which shall be had thereon. But it further provides, that if it shall be made to appear that the lunatic had no settlement in the commonwealth, the town of his residence shall not be liable.

This renders the law harmonious and symmetrical in one

respect; it makes the place from which the lunatic was committed, which is usually a plain matter of fact easily proved, the test of the right of the hospital to recover their remuneration from such town, unless such town could show that the lunatic has no settlement in the commonwealth, in which case he must be a state pauper, and his support would ultimately rest on the State at whose expense the hospital is established and maintained.

This imposes no new burden upon the town, but merely changes its form. If the town of the lunatic's residence is also the town of his settlement, the burden will rest where it falls; if he has no settlement there, it leaves upon such town the obligation of ascertaining and proving his settlement in some other town.

Still, however, the *St.* of 1837 corrected only the 9th section, giving a remedy in favor of the town of the lunatic's residence, over against the town of his settlement, in cases of judicial commitments. Then came the statute of 1841, before cited, which is general in its terms, and applies to every species of commitment of lunatics to the hospital, by courts, magistrates, overseers of the poor, or others; and so far as any argument can be drawn from the term "committed," we have seen that it is given by the statute to the act of the overseers, in sending a lunatic town pauper to the hospital, with the consent of the trustees. That the town of residence, if chargeable at all, should have a remedy for reimbursement from the town of settlement, is consistent with the whole spirit and policy of the poor laws, and the law of settlement. Any other rule of construction would impose a burden upon a town not liable, and exempt the town of settlement from a duty founded on a general principle. The court are therefore of opinion, that the defendant town is liable, that the direction was right, and that the plaintiffs are entitled to judgment on the verdict.

Exceptions in the first case overruled.

At the September term, 1852, another suit between the same parties, for the support of the same lunatic, came before

the court, having been commenced during the pendency of the former. In this action the plaintiffs claimed for all sums paid to the hospital from the first commitment of Swift, in 1844, to the time of bringing this second suit, December 31, 1851, deducting certain sums which had been allowed them by the commonwealth, and also deducting the amount recovered in the former suit, from December 15, 1848, to January 15, 1850. It comes before the court upon an agreed statement of facts.

It is contended on the part of the plaintiffs, that the former recovery was no bar to an action for the support furnished previously to the time sued for in that action, that the account consists of items, each of which constitutes a distinct and separate cause of action. It appears by the agreed statement, that whilst the former suit was pending, the plaintiffs moved for leave to file an amended count, extending their claim back to 1844, so as to cover the claim now made; but the court, though they granted time to file an amended count, refused to grant leave to enlarge the claim by extending it back to 1844, on the ground probably that it would introduce a new cause of action. It is quite certain therefore, that this anterior claim was not embraced in the former suit, nor proved on the trial. If it stood solely on the ground that the former recovery was a bar to the preceding claim, and up to the time of the commencement of that suit, we should be inclined to the opinion that, not being an entire contract, and in no way embraced in that action, it was no bar. *Badger v. Tutcomb*, 15 Pick. 409.

But the main ground relied on by the defendants is, that the action was not brought within two years from the time of the expense incurred as a condition precedent required by Rev Sts. c. 46, § 13, revising and reënacting St. 1793, c. 59, § 9, the long established law, regulating suits by one town against another. *Uxbridge v. Seekonk*, 10 Pick. 150; *Hallowell v. Harwich*, 14 Mass. 186.

It is urged however, on the part of the plaintiffs, that the former is in effect repealed by St. 1841, c. 77, by the provision that the town of a lunatic's residence being obliged to pay the hospital, shall have a right to recover against the town of

his legal settlement, the *full amount* paid to the hospital. But the court are of opinion that the purpose of this act was to determine the measure of damages; the actual expense paid; instead of being limited to one dollar a week, as directed by Rev. Sts. c. 46, § 15. It was not to alter the time, within which the action shall be brought, or the length of time for which a town may recover. The former law in these respects remained in force, and therefore the court are of opinion that, for all sums incurred prior to the commencement of the former action, the plaintiffs cannot recover.

It remains to consider the claim for the period which elapsed between the commencement of the former suit, and the time of the commencement of this suit. This depends on different considerations. The law is very explicit that for every new action a new notice must be given, even though a former action between the same parties, for the support of the same pauper, is still pending. *Sidney v. Augusta*, 12 Mass. 316; *Walpole v. Hopkinton*, 4 Pick. 358; *Uxbridge v. Seekonk*, 10 Pick. 150.

We do not perceive any reason why the law in regard to the three months' notice, and the recovery for two years only, does not apply as well where a town is chargeable for expenses incurred at the hospital, as to expenses incurred by the support of the pauper at home, unless indeed it be in fixing the three months in reference to the time of the expenses incurred. It was held in the case of *Worcester v. Milford*, 18 Pick. 379, that three months' notice after the time of the expenses paid was sufficient. A doubt was suggested in that case whether any notice was necessary; but as to this, it must be considered that in that case the lunatic was committed not by the overseers of the town itself, but by a judicial act.

In the present case the court are of opinion that the town claiming reimbursement was bound to give notice to the town of settlement, that the pauper still lived and required support, and that the party claiming can only recover from a period computed from three months next preceding the notice given. It appears by the facts agreed, that notice was given December 9, 1850. We think therefore that the time, for

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which alone the plaintiffs in this suit can recover, must be computed from September 9, 1850, three months before the notice, and continued down to the time of bringing this action, or the time when the defendant town assumed the charge of the pauper, whichever first occurred.

Judgment accordingly.

NOBLE T. GOODELL vs. SAMUEL C. SMITH.

The defendant agreed in writing to go to California with a mining company, as a substitute for the plaintiff, to work with the company two years, and to remit one half of his net earnings to the plaintiff, "at the expiration of the association." The company disbanded before the two years expired, and the plaintiff received his share of the profits to the time of dissolution. The defendant continued to labor in California on his own account, but refused to pay over any share to the plaintiff afterwards. *Held*, he was not bound to do so.

A plaintiff, who declares upon and offers in evidence a written contract as his ground of action, cannot introduce the oral declarations of the defendant as to his supposed liability.

THE action was assumpsit; the writ contained the common counts, and an account annexed, as follows: "1849, March 19. To cash received by the defendant of the plaintiff to his use, \$300. To same, received about ten days previous to March 19th, \$25."—Also a special count on a written contract made by the parties March 19, 1849, in which the plaintiff agreed "to furnish \$300 to the Ware Mechanics and Mining Association, a company organized for California, for their benefit and use; and \$25 additional for the private use of the defendant." In the same contract the defendant engaged to "accompany the members of said association to California, as a substitute for the plaintiff, and work with the company two years, and be subject to the regulations of said association; also to remit by the company, or otherwise, as the plaintiff should direct, one half of his share of the profits, if any, at the expiration of the association."

The breach alleged was, that the defendant did not continue to labor two years in California, and remit one half the pro-

ceeds of his earnings during all that time ; but there was no allegation that the defendant had made any other contract with the plaintiff for one half his earnings, than as above set forth. The action was brought in the court of common pleas.

At the trial before *Bishop, J.*, it appeared that the plaintiff paid the \$300 to the association, and the \$25 to the defendant, as the contract required, and that the defendant went to California with the association, as the substitute for the plaintiff. Upon, or before the arrival of the defendant in California, eight members deserted, and the remaining four, including the defendant, worked together until December 1, 1849, when they also separated and divided their joint funds on hand. The portion then belonging to the plaintiff amounted to \$55.56, which was duly paid him, and no controversy exists as to that sum. After the company was disbanded, the defendant remained in California, working on his own account, and in November, 1850, arrived home, bringing \$444, as the net proceeds of his personal labor after the dissolution of the company. Soon after his return, the plaintiff demanded of him the money advanced, and the defendant gave him \$50, but denied his liability to pay any thing. The plaintiff offered to prove that the defendant had said, while in California, that "he was to stay two years ; that the breaking up of the company would make no difference with him, and that the plaintiff was to have one half of his earnings." This testimony was objected to, because the plaintiff had declared upon and offered in evidence a written contract which should alone determine the liabilities of the parties ; and the testimony was excluded. The plaintiff also asked a witness "whether the defendant had admitted his liability to work for the plaintiff two years, notwithstanding the dissolution of the company." This was objected to, because no claim had been made for his earnings after the dissolution, and it was rejected ; to which rulings the plaintiff excepted. The plaintiff claimed, that upon a fair construction of the written contract and the declarations of the defendant offered in evidence, there was a breach of the contract by the defendant, and a liability to refund the \$325 advanced. But the presiu-

ing judge ruled otherwise, and the verdict was for the defendant. The plaintiff excepted.

E. Dickinson, for the plaintiff.

C. P. Huntington, for the defendant.

SHAW, C. J. It is quite clear, we think, that the \$325, advanced by the plaintiff, cannot be recovered of the defendant. Three hundred of it was paid to the company and not to Smith, to enable the plaintiff to become a member, which he did in his own name. The \$25 was paid Smith, in part consideration of his executory agreement to go to California. Smith's agreement with Goodell was special, to go to California, as Goodell's substitute, to work in that company. He did go to California, and worked as long as the association remained in existence. We are of opinion that no breach of that agreement is either alleged or proved. No agreement to work in California, independent of the association, is averred; if there was any such contract, it should have been alleged and proved.

The agreement between these parties being in writing, the admissions of the defendant, as to its effect were rightly rejected. If they varied the terms, they were not competent; if they did not, they were immaterial.

Exceptions overruled.

COMMONWEALTH vs. JACOB W. VAUGHAN.

A. was tried for maliciously burning a barn of B., and there was evidence implicating C. in the offence. To show malice on the part of C. towards B., the prosecution proved that he had, before the fire, commenced a criminal prosecution against B., on which the latter was discharged. *Held*, that A. could not show, in order to disprove malice, that such prosecution was founded on probable cause.

THE defendant was tried before *Bishop, J.*, in the court of common pleas, for maliciously burning the barn of Jason Powers. Under the ruling of the judge, excluding certain evidence offered by the defendant, he was found guilty, and

filed his bill of exceptions to this court. The nature of the testimony offered and rejected, is stated in the opinion.

C. Delano, for the defendant.

Clifford, (attorney-general,) for the Commonwealth.

SHAW, C. J. We can perceive no sufficient ground to sustain these exceptions. On an indictment of the defendant, for the wilful burning of the barn of one Powers, evidence had been offered to implicate one Stacey with him, and to show conspiracy between them. To show malice on the part of Stacey towards the prosecutor, Powers, he had been asked by the counsel for the government, whether sometime before the fire, Stacey had instituted a criminal prosecution against him. Having answered that Stacey did commence such prosecution against him, from which he was discharged, the counsel for the defendant put questions to the witness, to show that such prosecution was founded on probable cause, in order to rebut malice; which was objected to and rejected. This rejection we think right; without relying much on the consideration that it would lead too far, and into the trial of a distinct issue, we think such an inquiry would be immaterial to the case on trial. It was not a question whether there was such want of probable cause and legal motive, that an action for malicious prosecution might have been sustained; and we think the authorities on the subject of malicious prosecution do not apply. It was a question of actual hatred and ill-will, which would naturally lead to a desire of revenge, and so operate as a motive. The mere fact that Stacey had commenced a criminal prosecution might have some weight, perhaps slight; but the manner in which the trial was conducted, and the testimony of the witnesses in it, were not competent.

Exceptions overruled.

THOMAS HASTINGS vs. AMHERST AND BELCHERTOWN RAILROAD COMPANY.

An information in the nature of a *quo warranto*, under St. 1852, c. 312, § 42, will not lie against a railroad company in behalf of a stockholder, merely because they issued stock below the par value, and began to construct their road before the requisite amount of stock was subscribed; it not appearing that the petitioner's private right or interest was thereby put in hazard.

The charter of the Amherst and Belchertown Railroad Company, St. 1851, c. 277, does not require the northern terminus of the southern section of the road to be in the "village" of Amherst; and taking land in said town, for a route not terminating in either village of that town, is not the exercise of a franchise not granted the company, within the prohibition of St. 1852, c. 312, § 42.

PETITION for leave to file an information under St. 1852, c. 312, § 42, and for an injunction against the further exercise, by the respondents, of certain franchises and privileges not granted them by their charter, St. 1851, c. 277.

The petitioner being a stockholder in the corporation, and having had his land taken for the construction of their road, complained that said railroad company was by their charter authorized to construct a railroad, from the depot of the New London, Willimantic and Palmer Railroad, in the town of Palmer, crossing the Western Railroad at or near the depot of said Western Railroad in Palmer, by the most convenient route, northerly through the town of Palmer, in the county of Hampden, and the towns of Belchertown and Amherst, in the county of Hampshire, and of Leverett, Sunderland, and Montague, in the county of Franklin, to the Vermont and Massachusetts Railroad, at a point the most convenient to intersect the same in said town of Montague: That the capital stock of said company should by law consist of not more than six thousand shares, the number to be determined by the directors of said company; and that no shares should be issued for a less sum or amount to be actually paid in on each, than the par value of the shares first issued: That for the purposes of construction, the road should by law be divided into two sections, one section extending from Palmer to the village of Amherst, and the other from Amherst

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to Montague; that a moiety of the capital stock should be appropriated and set apart for the construction of each section; that the construction of neither section should be commenced until a certificate should have been filed in the office of the secretary of the commonwealth, subscribed and sworn to by the president of said company, and a majority of directors thereof, stating that all of the stock appropriated and set apart for the construction of said section had been subscribed for by responsible parties; and that twenty per cent. of the par value of each and every share, so appropriated and set apart, had been actually paid into the treasury of said company.

The petition averred that the capital stock of said corporation had been fixed by the directors at four thousand shares, of the par value of one hundred dollars each, of which two thousand shares had been duly appropriated and set apart for the construction of the section aforesaid, which extends from Palmer to the village in Amherst; and that said two thousand shares so appropriated and set apart have not been subscribed for, but only sixteen hundred shares; and that twenty per cent. of the par value of each share so appropriated and set apart had not been actually paid into the treasury of said company: And that the subscription for a part of the said two thousand shares, to wit, two hundred shares, was obtained by said company in the following manner, viz: a contract for the construction of the section aforesaid, or a part thereof, had been entered into by said company and Willis Phelps and George Phelps, for a certain price, to wit, the sum of \$100,000, and that after the making of said contract, and for the purpose of a fraudulent and illegal evasion of the provisions and requirements of said act, it was agreed between said company and the said Willis and George, and sundry other persons, that \$5,000 should be added by said company to said contract price, and that said Willis and George should subscribe two hundred shares, part of said two thousand shares, and that other persons should purchase of said Willis and George shares so subscribed for as aforesaid, at a sum less than

the par value, to wit, the sum of twenty-five dollars per share. In pursuance of which corrupt, illegal, and fraudulent agreement, so made as aforesaid, the said Willis and George became, and were subscribers for two hundred shares, part of the said two thousand shares so set apart and appropriated as aforesaid: And that sundry other persons offered to give certain sums of money, to wit, twenty dollars each, for the construction of said section of said road, but were unwilling to subscribe and pay for one share each; and that for the purpose of evading the provisions of said act, and to make it appear on their subscription lists and books that a larger number of shares, part of said two thousand shares, had been subscribed, than in truth and reality had been done, it was illegally and for the purpose of deception, agreed between the said company and the said last mentioned persons, that each of said persons should subscribe for one share in said company's stock, part of said two thousand shares, and that neither of said persons so subscribing should ever be called upon to pay the par value of said shares so subscribed for, but that upon the payment of twenty dollars on the share, each of said subscribers should be released from the payment of the balance of the par value of said share; and that no certificate for such share should be issued by said company: And that said shares so subscribed for by said Willis and George, and by said last-mentioned persons, have been considered, treated and counted by the president and directors of said company, as part of said two thousand shares required by the provisions of law to be subscribed for, before the construction of said section of said railroad should be commenced; and that without including said shares, said two thousand shares have never been subscribed for: And that previously to the commencement of the construction of said railroad, the subscribers for a number of shares, part of the said two thousand shares, gave their promissory notes for the amount of twenty per cent. on a share, and that the same were received by said company as actual payment into the treasury of said company, of said twenty per cent.; and that no payment has at any time hitherto been made in

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money upon said shares; and that, at the time of the commencement of the construction of said railroad, said notes were wholly due and unpaid: And further; that although the requirements of said act have not been complied with, yet the said company claims to exercise, and does now exercise all the franchises named in said act, and did, on or about the 1st day of April, 1852, commence the construction of said section of said railroad; and on the 16th day of August, 1852, did file in the office of the clerk of the county commissioners, in said county of Hampshire, a location of said section of said railroad, whereby it appears that said section of said railroad is not located from said Palmer to said village in Amherst, as is by law directed, but on the contrary that the northern terminus of said road is located at the distance of one half mile from said village, and that said location is the exercise by said company of a franchise and privilege not conferred by law; and further that by such departure from the line of location authorized by said act, the real estate of the petitioner is greatly and unnecessarily injured, and his interests put in hazard.

C. P. Huntington, for the petitioner.

E. Dickinson, for the respondents.

SHAW, C. J. This is a petition for leave to file an information in the nature of a *quo warranto*, against the respondent company, pursuant to the statute 1852, c. 312, § 42, upon the several grounds set forth in the petition.

The petitioner sets forth that he is a stockholder in said company; and also, that they pass through his lands. He must show satisfactorily, that in one or the other of these capacities, he is injured in his private rights. It is the purpose of this statute, to lend the aid of the government in an aggravated case of usurpation and encroachment on private rights by a corporation, by the exercise of a franchise not granted to them.

It is manifestly a very high power, to be exercised only upon extraordinary occasions, and for this purpose it is manifestly placed under the discretion of this court. If it were intended to be a remedy for the ordinary violation of private

right, the statute would have given the party aggrieved the power to file his information, as of right. Accompanied as it is with a power to issue an injunction as prayed for in this case, the occasion must obviously be an extraordinary and urgent one, to warrant it.

The complaint is, first that the company have violated their charter by issuing stock below par; and by beginning to work before they have completed their stock, by subscriptions of responsible persons; and second, that they did not pursue their charter by making a terminus of one section of the road at the village of Amherst.

I. This statute is not designed to punish a corporation for violations of duty, if not converted into a public prosecution, as it may be by the intervention of the attorney-general; and no judgment of forfeiture is to be rendered. But by § 47, it is provided, that the judgment shall be, that the corporation be perpetually excluded from *such* franchise or privilege. From what franchise? Manifestly a franchise not conferred by law, by the exercise of which the private right or interest of any person is injured or put in hazard.

It is exceedingly questionable whether any of the breaches of duty alleged in the petition, in the mode of issuing the stock; in issuing stock below par, as prohibited by § 12 of their charter, is the exercise of a franchise not granted, to the injury of the petitioner's private right. They are empowered to raise money, in the manner directed; this is a franchise granted; but the argument is, that it is granted conditionally, that is, upon condition that they comply with the requisitions of the law; that these are conditions precedent, and if they are not complied with, the power is not conferred.

This assumes several positions, which, to say the least, are doubtful. 1. That they are conditions. 2. That they are conditions precedent. 3. That they are injurious to the petitioner's private right and interest.

1. The statutes do not make them conditions, in terms, and there are ample means of enforcing their observance, without holding all the proceedings void, if not complied with. They may be directory.

2. They may be conditions subsequent, and then they do not suspend the right to exercise the franchise, but only subject the company to some penalty or forfeiture.

3. But further; we cannot perceive how they can injure the private right of the petitioner. Certainly not as a proprietor, or holder of shares in the stock. On the contrary, it may be beneficial to him in that capacity, by promoting the enterprise.

But we are then to consider another point, which is preliminary, and that is, the certificate required by the 14th section. This provision renders it less necessary to construe these requisitions about stock as suspensive conditions. This section provides that before they proceed to commence the construction of the road, on the section now in question, a certificate shall be filed, &c. This carries a strong implication, that when such certificate is filed, they may commence, &c., still remaining liable in other respects, to the requisitions and the particular provisions of their act of incorporation, and the general laws referred to, and adopted by it.

If, then, it be inquired what is the legal effect of this certificate, we must answer different in different aspects. Certainly it would not be conclusive of the facts in a criminal prosecution against the corporation. But it is to be taken as *prima facie* evidence of the facts contained in it, and goes far to rebut and control the allegations of non-performance of the duties set forth in the petition.

But in regard to the supposed breach of duty in not properly issuing the shares, how does this operate to the present injury of the petitioner as a landholder?

If compliance with the requisitions in regard to the amount subscribed, and the issuing of stock below par, are not conditions precedent to the commencing and making of the road, then whether this money has been subscribed and paid, or not, there is no injury to the petitioner, as a landholder; it makes no difference to him. The law has provided security to him, which is deemed a complete indemnity.

II. As to not making the village in Amherst one terminus.

It is difficult to see how this can be injurious to the petitioner. It is barely possible, that by going to either of the two villages in Amherst, they would necessarily avoid touching his land, and so the present location may be injurious to him, though, without more knowledge of the localities, we cannot perceive how this could be done.

But without dwelling further on this, it appears to us that the actual location is not a violation of their charter.

The whole act is to be taken together as one act, and every part must be construed with reference to every other. The express authority and franchise is to make a railroad from Palmer to Montague, through Belchertown, Amherst, Leverett, &c. There is no other limit between the *termini*, but the towns. This alone would authorize the railroad company to lay their road where they have laid it. Then the question is, whether this is altered or modified by the provision in the 13th section. That provides that the road thereby authorized, the same road, shall be divided into two sections, one extending from Palmer to the village of Amherst, and the other from Amherst to Montague. What is the object of this section? Obviously, we think, to divide the one line already authorized into two parts, so as to allow one to proceed, if the stock for that part could be raised, without the other. It appears to us that it is not intended to fix a new intermediate terminus, but to fix a point at which the whole line authorized to be constructed should be divided. Suppose funds had been obtained, in the first instance, for the entire line; would it not be competent to run through Amherst without a depot or terminus, at either village; in fact, as it has been run? Did the legislature intend to depart from this, and vary the route, if one section only were first built? We think not. The second section of the road is described, as from Amherst to Montague, without saying the village in Amherst. But the two parts were intended ultimately to meet, unite, and form one line; and they must, therefore, come to the same point in Amherst. We think the term "village of Amherst," used in this part of the act, was not intended to vary the line of location and route stated in the previous section, but to fix a point of the

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line northerly from Palmer, to which the first section should extend, if the stock for both should not be filled up.

We think, therefore, there is no sufficient ground to maintain that they have exercised a privilege not granted, in locating this first section of their road so as to extend as far north as the village of Amherst; and that a straight line from one village to the other fixes the line of this section of road with reasonable accuracy. The petitioner's land, therefore, is within the limits within which they are authorized to locate their road; and, in this respect, they did not exercise a franchise not granted.

Petition dismissed.

SUPPLEMENT.

The "Provident Institution for Savings, in the town of Boston," although chartered in the year 1816, is nevertheless subject to the general laws of the Commonwealth, passed since that time, relating to investments of deposits by Savings Banks and Institutions for Savings.

The justices of the supreme judicial court, in answer to a question submitted them by the Honorable Senate, gave the following opinion. The question was:—

Is the Corporation known as the "Provident Institution for Savings in the town of Boston," chartered in the year 1816, subject to the general laws of the Commonwealth, relating to Savings Banks and Institutions for Savings, passed since the granting of the charter aforesaid?

This question relates directly to the rights and duties of a private corporation, under existing laws. The embarrassment felt by the justices of this court, in expressing an opinion in this manner, in such a case, was particularly stated in an opinion heretofore given to the Honorable House of Representatives. In giving that opinion, it was said, "as the questions on the face of them seem to involve a controverted question of right between the commonwealth and a private corporation, a question apparently and peculiarly fit to be decided in a regular course of judicial proceeding, we had doubts, at the first view of the subject, whether it was a case coming within the intent of the Constitution, pursuant to which, questions of law are to be proposed; and whether it might not be expedient first to submit to the consideration of the Honorable House, whether it would be expedient to request an *ex parte* opinion in such a case. Our doubt was this; as we have no means in such a case of summoning the parties adversely interested, before us, or of inquiring in a judicial course of proceeding, into the facts upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment binding on the rights of the parties. But as we understand that the session of the legislature is drawing to a close, and it might be inconvenient to the house to refer the matter back to them

before acting upon it, and as an opinion upon an abstract question, without any investigation of facts, and without argument, must be taken as an opinion on the precise question proposed, which cannot affect the rights of parties, should they hereafter be brought before the court in a regular course of judicial proceeding; we have thought it best, without further delay, to submit an opinion upon the questions proposed." (5 Met. 597.)

The above remarks have been quoted at length, as applying with full force to the present case, and the same doubts expressed in the case referred to, is now felt in an equal degree, by the undersigned. But it being understood that it was expected by the Honorable Senate, that an answer to their inquiry would be forwarded to their president in the recess of the legislature, the question having been proposed near the close of the session, and as that expectation must be disappointed by waiting to refer the matter to the Honorable Senate, when again assembled, in compliance with the request of the senate, the following opinion is now respectfully submitted.

By an act of the legislature, passed March 11, 1831, and which, with some changes not necessary to be particularly stated, is reenacted in the Revised Statutes, c. 44, § 23, it was enacted, "That all acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter be liable to be amended, altered or repealed, at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted, in such act of incorporation, an express limitation as to the duration of the same." Thus, all acts of incorporation, passed after the passage of the above act, are liable to be amended and altered, or repealed at the pleasure of the legislature, in the same manner as if that act was inserted as an express provision in each charter. But acts of incorporation, passed before the passage of that act, are not liable to be so altered, or amended, or repealed by the legislature; but the corporations created by them, are, nevertheless, subject to the general laws of the legislature, which are not inconsistent with, and do not violate any of the provisions of their particular acts of incorporation.

There are now four Savings Banks, or Institutions for Savings, in whose acts of incorporation there is no express provision subjecting them to the control of the legislature, and which were incorporated before the passage of the above-mentioned act of 1831. These four institutions are—those at Boston, Salem, Newburyport, and Roxbury, whose acts of incorporation are all perpetual. The present inquiry is confined to the Provident Institution for Savings in Boston. This was the first institution of the kind incorporated in this commonwealth; some general interest having then been recently excited in relation to such institutions

Such has been the increase of these institutions, and so largely have they enjoyed the public confidence and favor, that it appears by the recent report of the bank commissioners, that there are now in operation in this commonwealth, forty-nine Savings Banks, having more than eighty-six thousand and five hundred depositors, and an amount of deposits exceeding fifteen and a half millions of dollars.

Such a number of depositors, composed mostly of persons of small means, and of a character eminently requiring the watchful care and protection of the government, and such an amount of capital stated by the bank commissioners to exceed one-third of the aggregate capital of the banks of circulation, are surely subjects of sufficient importance to attract the attention and call for the action of the legislature; accordingly the legislature has, from time to time, passed general laws in relation to Savings Banks. But as the Provident Institution for Savings in Boston, was incorporated before the act of 1831, giving the legislature a right to amend and alter acts of incorporation, subsequently passed, and as there is no express provision in the charter of that institution, giving to the legislature such a control over it, the question now is, whether that institution, and of course, other similar institutions, similarly situated, are subject to the general laws which have thus been passed in relation to Savings Banks, or whether they are beyond or above the reach of these laws?

This is a question of very grave import, as affecting the rights of private corporations, and it deeply concerns the public to know, whether or not some of the largest institutions for savings in the commonwealth, with perpetual charters, are exempt from the operation of these general laws. There is quite a number of these general statutes, extending through a course of years from 1834 to 1852 inclusive, containing various distinct provisions, upon different subjects, and intended to accomplish different objects. Whether or not the institution for savings in Boston is subject to these laws, depends upon the question, whether or not the provisions of the laws are consistent with the chartered rights of the institution.

There can be no doubt that the institution is bound by the provisions in these laws, so far as these provisions are consistent with the rights of the institution, as secured by its charter, and the only ground upon which the corporation can rightfully resist any of the provisions in these laws, must be that such provisions are in violation of the chartered rights of the corporation.

Now the question propounded by the Honorable Senate, is, in general terms, whether the institution for savings in Boston is subject to the general laws relating to Savings Banks, referring to no particular law, nor to any specified provision or provisions of the laws, and, there-

fore, embracing all the various provisions of these several laws. To answer this inquiry particularly, and according to its terms, would require a careful analysis of these general laws, and an examination of, and commentary upon all their various provisions, with particular reference to the provisions of the charter of the bank in question, as only upon such particular examination can it be determined, whether the various provisions of the laws, upon different subjects, and for different purposes, and involving different principles, are, or are not, consistent with the rights secured to the corporation.

It is not supposed that the Honorable Senate could have had in view such a particular and extended inquiry, a large portion of which would probably be wholly unimportant as having no bearing upon any question actually raised, or likely to be raised, in relation to the laws under consideration. Upon examining the recent report of the bank commissioners, the only question which appears to have been raised by the Provident Institution for Savings in Boston, in regard to the general laws relating to Savings Banks, is whether that particular institution is bound to make its investments in conformity to the provisions of these general laws. The undersigned propose to confine their attention to this portion of these general laws, as being the only portion, the binding force of which appears to have been called in question, believing that, in so doing, they will satisfactorily meet and answer the inquiry of the Honorable Senate. A general law in relation to Savings Banks, passed April 2, 1834, among other things, prescribed the modes in which deposits should be invested. The Revised Statutes, c. 36, § 78, has the following provision in relation to investing deposits: "All such sums may be invested in the stock of any bank, incorporated under the authority of this commonwealth, or of the United States, or may be loaned on interest to any such bank, or may be loaned on bond or notes, with collateral security of the stock of any of the said banks, at not more than ninety per cent. of its par value; or they may be invested in the public funds of this commonwealth, or of the United States, or loaned on a pledge of any of the said funds; or invested in loans to any county or town in this State, or in mortgages of real estate; provided, that the whole amount of stock held by the institution at one time in any one bank, both by way of investment and as security for loans, shall not exceed one half of the capital stock of such bank, and that not more than three quarters of the whole sum deposited in the institution, shall be at any one time invested in mortgages of real estate." Section 79. "If the moneys held by any such corporation, cannot be conveniently invested in any or all of the modes hereinbefore prescribed, then it shall be lawful to loan, not exceeding one half part of the amount thereof, on bonds or other personal securities, with at least two sureties; provided,

that the principal and sureties shall all be citizens of this Commonwealth, and resident therein."

By the act of March 5, 1841, c. 44, it is provided, that "all Savings Banks, and institutions for savings, may make loans upon bonds or notes, with the pledge of the stock of any railroad company, incorporated under the authority of this commonwealth, the whole amount of whose capital is actually paid in, such loan not to exceed eighty-five per centum of the par value of such stock; provided that no such loan shall be made upon the stock of any company whose road or franchise is subject to any mortgage or pledge; and provided further, that no loan shall be made on any railroad stock, whose stock shall not at the time said loan is made, command at least their par value in the market; and no such bank or institution shall so loan more than fifty per cent of the amount of their deposits."

These are the provisions of the laws in question, and the inquiry is, whether the Provident Institution for Savings in Boston is bound by these provisions.

In making these enactments, there is no doubt that the great purpose of the legislature was, to protect the depositors from loss and injury, and that there was no intention to take away from Savings Banks any powers necessary to the accomplishment of their appropriate business, but only to guard against the improvident exercise of those powers.

If the business of Savings Banks had been done by individuals, or as it is said to be done in England, by voluntary associations, regulated by acts of parliament, there can be no doubt that the legislature might provide for the safety of the depositors, by prescribing, by general laws, the modes in which these individuals or voluntary associations should invest the deposits. Such enactments would clearly be within the rightful power of the legislature. It is not only the right, but the duty of the legislature, to make all such reasonable and wholesome laws, in regard to all the various branches of business and pursuits in the community, as may be necessary for the safety and welfare of the body politic. It is upon this principle that the legislature has prohibited altogether, what has been called private banking, by subjecting every person to a penalty who shall issue, or pass any note, bill, order or check, with intent that the same shall be circulated as currency, except such as are particularly specified in the act.

The object of this general law is to protect the public from impositions and losses, to which it would be exposed by the circulation of the notes or bills of individuals. It is upon this general principle that the legislature has from time to time made general laws in regard to attorneys at law, physicians, auctioneers, manufacturers of boots and shoes, hawkers and peddlers, and various other classes of persons, and various

branches of business, to which it cannot be necessary more particularly to refer.

This superintending power of the legislature applies not only to individuals, or natural persons, but, with equal fitness and propriety, to artificial persons or corporations, except so far as these bodies are exempted from the operation of this power, by the provisions of their charters.

To provide for the safety and well being of institutions for savings, is surely a most appropriate exercise of the superintending power of the legislature. These institutions are established wholly for public purposes, are intrusted with large amounts of money belonging to persons who can ill afford to lose it, and who are in no condition to be able to judge of, or provide for, its security.

The officers and managers of these institutions have no private, personal, pecuniary interest in them, but conduct them wholly for the benefit of the poorer classes of the community, and therefore, laws made for the benefit and security of depositors, cannot be objected to by these officers, on the ground that any interest of their own is affected. The directors and managers of banks generally, are personally interested in them, but the officers of savings banks act wholly for the public and for the poorer and less prosperous classes of the public.

The usefulness of the Institutions of Savings must depend on their possessing the public confidence, and the public confidence must very much depend upon their being under the wholesome inspection and control of the government. It is, no doubt, important, both as respects the public confidence, and as regards the safety of their operations, that all these institutions should be subject to one uniform system of regulations, particularly in a matter of so much importance as the mode of investing deposits; and the general laws upon this subject, being clearly within the general and rightful power of the legislature, and relating to a matter of great public concernment, must be binding upon the Provident Institution for Savings in Boston, in common with other similar institutions, unless that institution is beyond the power of the legislature in this particular, by force of the provisions in its particular act of incorporation.

It becomes necessary, therefore, to examine particularly this act of incorporation.

It is now the well-settled law of the land that the charter of a private corporation is a contract within the meaning of the Constitution of the United States, and that any act of a state legislature which violates any corporate right, secured by such charter, without the consent of the corporation, is void as against that constitution.

The undersigned readily accede to the authority of this doctrine, not

only because it has been established by the highest judicial tribunal in the country, whose decisions are binding on this subject, but also because it approves itself entirely to their own understandings. Legislation, in violation of chartered rights, is not only contrary to the Constitution of the United States, but is at war with the first principles of a just and well-ordered government. It must be presumed that the legislature at all times, and under all circumstances, intends to observe good faith. Laws, which are inconsistent with the good faith of the legislature, which impair the validity of its contracts, and infringe on rights held under its own solemn guaranty, cannot for a moment, upon any consideration, be enforced. But are the general laws in regard to the investment of the deposits of savings banks inconsistent with the rights of the Provident Institution for Savings in Boston, as secured to it by its charter? The charter bears date December 13, 1816. The first section incorporates the persons named, by the name, style, and title of "The Provident Institution for Savings in the town of Boston."

By the second section, the corporation is made capable of receiving deposits of money.

The third, enacts "that all deposits of money received by said society shall be by the said society used and improved to the best advantage," and provides for the distribution of the income or profits thereof, and for the withdrawal of the principal.

The fourth section relates to the annual meeting, and election of members.

The fifth makes provision for a common seal, for making deeds, conveyances and grants, and covenants and agreements; and that the corporation shall have power to sue and be sued, &c.

The sixth section provides for meetings and the election of officers.

The seventh section gives power to make by-laws, not repugnant to the constitution or laws of the Commonwealth.

The eighth and last provides for the calling of the first meeting.

This act, in effect, only incorporates certain persons as a Savings Bank, in the most general form, without any grant whatever of any particular or specific powers or privileges, as to the manner of conducting the business.

It accomplished, merely, what is the prime object of an incorporation, that is, "to bestow the character and properties of individuality upon a collective and changing body of men."

The act provides, that the corporation shall be capable of receiving deposits, and enacts "that all deposits of money received by the said society shall be by the said society used and improved to the best advantage." This last clause might, perhaps, be considered as merely enjoining a duty, and the general law, which prescribes how the invest

ment shall be made, as pointing out the mode in which that duty shall be performed. But at all events, the charter prescribes no mode in which the investment shall be made, but is entirely silent on that subject. There is no grant or provision whatever, in relation to it. If the Provident Institution for Savings in Boston claims the privilege of exemption from legislative action, on one of the legitimate subjects of legislation, it must show that that privilege is granted in their charter. But there is no such express or implied grant. This corporation possesses only such powers as are either expressly or impliedly granted by its charter. There is no express grant in the charter for any power whatever, in relation to the mode of making investments.

Incidental or implied powers, upon just principles of construction, can be made to embrace, at most, only such powers as are essentially necessary to enable the corporation to accomplish the purposes of its creation. Now the provisions of the general laws, prescribing the modes of investment, so far from taking from the corporation any power necessary to accomplish its appropriate business, are directly in aid and support of that power, and adapted and designed as safeguards to the corporation that it might accomplish its appropriate duties, with greater safety and advantage, and the better answer the design of its creation.

It may, perhaps, be said, that the corporation at the time it took its charter, could invest its deposits at its own discretion, without restriction as to the modes of investment. Be it so. But it thus acted, not by virtue of any special power or privilege granted in the charter, in relation to investments, because the charter is silent on that subject, but wholly under and by virtue of the general laws of the Commonwealth. No special power or privilege being given in the charter, as to the mode of conducting its business, the corporation managed all its affairs according to the general laws. It took its charter subject to the general laws, and, of course, subject to such changes as might be rightfully made in such laws. The legislature, surely, did not guarantee to the corporation that there should be no change in the laws, that the whole system of legislation should remain as it was in 1816. There were at that time, no general laws in regard to savings banks, as there were no savings banks. But after these institutions were established, and had become numerous and important, it was within the appropriate power of the legislature to make such general laws for their regulation as the public good might require, and there was nothing in the charter of the institution at Boston, to exempt it from the operation of these general laws, and it must, of course, be subject to them in common with all the other similar institutions.

The legislature, by giving to the institution in Boston the privilege of being a corporation, and of managing its proper business, did not relinquish any power of legislating on all proper subjects of legislation.

The institution, at the time it was incorporated, had the right and power, under the general laws, to loan money at six per cent. interest, but there can be no doubt that the legislature could alter the law, so that the institution could take only four or five per cent. interest. The corporation had power under its charter, to hold and dispose of property, but there was nothing in the charter as to the mode, and of course, the property could be held and disposed of only according to the general laws, which the legislature might at any time alter, and the corporation would be bound by the alteration.

The corporation might indorse and negotiate promissory notes, but only according to the general laws, as there was nothing in the charter on the subject, but the legislature might change the whole law on this subject, at any time, or take away altogether, by general laws, the right to indorse and negotiate notes, and these laws would be binding on the corporation. But it cannot be necessary to extend these illustrations. The legislature cannot be deprived of the power it holds for the public good, by any doubtful construction, or remote inference.

The position that the legislature has granted away any of its appropriate powers of legislation, can be supported only by clearly showing such grant. In the present case, there appears to be nothing in the charter of the Provident Institution for Savings in Boston, to exempt it from the provisions of the general laws, passed since the date of the charter, relating to Savings Banks prescribing the modes of investments, and the undersigned are, therefore, of opinion, that that institution is subject to those provisions of those general laws.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
RICHARD FLETCHER,
GEORGE T. BIGELOW,
CALEB CUSHING

September 20, 1852.

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ACCEPTANCE.

See STATUTE OF FRAUDS.

ACCOUNT BOOKS.

See BOOKS OF ACCOUNT.

ACTION.

1. An administrator of a person killed by a collision on a railway, cannot maintain an action for such injury under St. 1842, c. 81, § 1, where the death of the intestate was instantaneous with the collision. *Kearney v. Boston & Worcester Railroad Corporation*, 108.
2. That statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right. *Ib.*
3. A master or principal is not liable to one servant or laborer, for the neglect of another servant or laborer, in the same general business or employment; and the fact that the servant injured is a minor, does not at all affect his legal rights. *King v. Boston & Worcester Railroad Corporation*, 112.
4. The obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence. *Ib.*
5. The plaintiffs and defendant were members of a voluntary unincorporated association, for raising money to aid the people of Ireland in their struggle for independence. The plaintiffs with others, contributed moneys for this object, which were handed to the defendant, as treasurer of the association, and by him placed with the general funds thereof. The final application of the contributions was to be made by a directory, chosen by the association; but by a vote of the majority, the defendant temporarily invested the funds in stocks. The object of the association failed, and no money was applied for that purpose, but there were some incidental charges and expenses, and losses by bad investment. *Held*, that an action for money had

- and received would not lie to recover of the defendant the amount of any contribution. *Murray v. McHugh*, 158.
6. A debtor of the defendants and also of the plaintiff gave the plaintiff a chattel mortgage to secure both debts. The plaintiff afterwards authorized the defendants to take possession of the mortgaged property, and convert it into money, for their joint benefit. On the same day the defendants covenanted with the plaintiff "to pay him \$1,000, to his sole use as soon as the cash should be realized from the sale and disposition of the mortgaged property." The defendants then sold most of the mortgaged property, partly for cash, and partly for notes, all which they kept. They also retained the balance of the property which was unsold, except a portion which was re-delivered to the mortgagor and he was discharged. The plaintiff brought his action upon the covenant to pay him the \$1,000 before that sum had been actually received by the defendants; *Held*, that the action could not be maintained. *Brown v. Dutton*, 209.
 7. It seems that assumpsit will not lie in this commonwealth, to recover back a tax paid under protest, unless the tax is entirely void; if the objection to the tax is merely some defect or irregularity in making the assessment, the remedy is by appeal. *Wright v. Boston*, 233.
 8. No action at law can be maintained on a joint agreement by the plaintiffs and defendants, who were all members of the same joint stock company, formed to purchase a vessel of the plaintiffs. *Myrick v. Dame*, 248.
 9. A. and B. entered into an entire contract, by which B. was to do a specific piece of work for A. Before it was completed, B. addressed to A. the following note: "I hereby authorize R. R. to finish the job already commenced . . . and to take the balance, whatever may be due;" and A. indorsed thereon, "Whatever balance may be due on the within job, when completed, as per agreement, shall be paid to R. R." B. subsequently brought an action against A. on the contract, in his own name, and it was held that the action could not be maintained. *Derby v. Sanford*, 263.
 10. A creditor may prosecute an action against his debtor to final judgment, notwithstanding, after the action is commenced, the defendant institutes proceedings in insolvency, and the creditor offers the claim in suit for proof against the estate. *Barker v. Haskell*, 218.
 11. The question, whether an action for injury to the person under *St. 1842, c. 89*, may be maintained by an executor or administrator, depends on the fact whether the testator or intestate lives after the act which constitutes the cause of action, so that a right of action accrues to the person killed, and survives to his personal representative; and the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the person injured. *Hollenbeck v. Berkshire Railroad Company*, 478.
 12. A. contracted under seal, to build a dam, according to the specifications and in the manner set forth in the contract, the last instalment of the price to be paid when the dam should be completed according to the contract. A., acting in good faith, and with an honest intention of fulfilling the contract, built a dam, though not according to the contract; it was held that he might maintain an action for work done and materials furnished, and that

the jury should deduct from the contract price, so much as the dam built was worth less than the dam contracted for. *Gleason v. Smith*, 484.

See **BILLS OF EXCHANGE**, 2; **CONTRACT**, 3, 4; **MUTUAL INSURANCE COMPANY**; **STATUTE OF FRAUDS**; **WORK AND LABOR**, 1, 2.

ADJUDICATION.

See **DRAINS AND SEWERS**, 2; **PAUPER**, 1.

ADMINISTRATION.

1. A testator, before his decease, gave a bond to convey real estate, and took from the obligee an obligation to take the estate and pay the purchase-money at a time stipulated; the testator executed and acknowledged a deed, but died before the time of payment arrived; when the day of payment arrived, the executor received the purchase-money and delivered the deed; such money having been received by the executor on a personal obligation belonging to the estate, he is bound to account for the same. *Loring v. Cunningham*, 87.
2. Salary voted to a person after his decease, and paid to his executor, is assets of the estate to be accounted for by the executor. *Ib.*

ADMINISTRATOR.

1. An administrator of a person killed by a collision on a railway, cannot maintain an action for such injury under *St.* 1842, c. 81, § 1, where the death of the intestate was instantaneous with the collision. *Kearney v. Boston & Worcester Railroad Corporation*, 108.
2. That statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or being entitled to bring it, to have died before exercising that right. *Ib.*
3. The question, whether an action for injury to the person, under *St.* 1842, c. 89, may be maintained by an executor or administrator, depends on the fact whether the testator or intestate lives after the act which constitutes the cause of action, so that a right of action accrues to the person killed, and survives to his personal representative; and the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the person injured. *Hollenbeck v. Berkshire Railroad Company*, 478.

See **ADMINISTRATION**.

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ARBITRAMENT AND AWARD.

1. When a submission to arbitrators is in the most general form, of all demands whatever, and there is an award of a certain sum of money as balance due from one to the other, it is a full execution of the submission. *Strong v. Strong*, 560.
2. If, under a particular submission, accompanied with a general submission, award be made concerning the particular things, and also for a money payment, the money payment will be intended to cover all other demands, unless the contrary appears. *Ib.*
3. Every reasonable intendment is to be made in favor of an award. *Ib.*
4. The rule of law, that, in order to be valid, an award must be certain and final, means, not that nothing shall remain to be done to complete the execution of the award, but that the things to be done shall be determined and defined to a reasonable certainty. *Ib.*
5. By the common law of Massachusetts, differing in this respect from the English common law, corruption or misbehavior, excess of authority, or gross errors or mistakes on the part of arbitrators, are pleadable in bar to an action on their award. *Ib.*
6. Partiality on the part of an arbitrator, unless expressly waived by the parties in the submission or otherwise, is a good defence to an action on the award. *Ib.*
7. To act as the agent of one of the parties regarding the matters in controversy, or to receive and act on *ex parte* representations or evidence, or otherwise permit undue influence from any quarter, constitutes such partiality as will invalidate an award. *Ib.*
8. Testimony as to declarations of an arbitrator, uttered *in pais* after the making of an award, is not competent evidence to impeach its validity. *Ib.*
9. Though, in general, an arbitrator cannot be received to impeach his own award, especially by declarations *in pais*, yet he may depose to facts which transpired at or during the arbitration, and which tend to show the award to be void for legal cause. *Ib.*

ASSESSMENTS.

See CORPORATION, 1, 6; MUTUAL INSURANCE COMPANY 2, 3, 4.

ASSETS.

See ADMINISTRATION, 1, 2; ASSIGNEES, 1.

ASSIGNEES.

1. The assignees of an insolvent debtor, a portion of whose assets consists of shares in a manufacturing corporation, are not liable, either at law or for contribution in equity, to a creditor of the corporation, himself a member, under any of the statutes of this commonwealth, which render members of such a corporation personally liable for its debts; although the assignees attended meetings of the corporation and acted as stockholders. *Gray v. Coffin*, 192.
2. The provisions of St. 1838, c. 98, apply to all corporations, whether created before or after the passage of the act. The term "trustees," in that act, does not embrace "assignees" chosen under the insolvent law, St. 1838, c. 163, subsequently enacted. *Id.*

ASSIGNMENT.

See ACTION, 9.

ASSUMPSIT.

A declaration contained four special counts, setting forth a contract that the plaintiff agreed to furnish to the defendant, leather to be manufactured into shoes, for which the plaintiff was to pay the defendant a certain compensation. One count alleged, as a breach of the contract, that a portion of leather the defendant had converted to his own use, contrary to the contract, whereby the same was wholly lost to the plaintiff. Another count averred a failure by the defendant to manufacture and return a part of the leather, either manufactured into shoes, or in any other way, and that the same was wholly lost to the plaintiff by reason of such breach of contract. Another count set forth that the defendant so negligently and unskillfully conducted himself in the business, that, by reason thereof, a portion of the leather was wasted and lost. The other count alleged a conversion of the leather by the defendant, by permission of the plaintiff, and an agreement, in consideration thereof, to pay the plaintiff the reasonable value thereof. It was held, that these were all proper counts in assumpsit, and that it was immaterial whether the breach was caused by tortious acts, which would have enabled the plaintiff to maintain an action *ex delicto*. *Rich v. Jones*, 329.

See ACTION, 5, 7, 8, 9, 10; WORK AND LABOR, 1, 2.

ATTORNEY.

See PARTNERS, 5, 6.

AUDITOR'S REPORT.

1. The filing of new counts, after an auditor has made his report, is no proof that the trial at bar was of a different cause of action from that which appeared on the record when the auditor was appointed. No exceptions having been made to the filing of the new counts, it must be understood, in the supreme court, that they were for the same cause of action as the original counts. *Rich v. Jones*, 329.
2. An auditor, appointed under Rev. Sts. c. 96, in an action to recover the value of certain leather delivered to the defendant, to be made into shoes, and alleged to have been converted by him to his own use, may find, as a fact, whether any thing, and how much, is due from the defendant to the plaintiff; and his report on this question is *prima facie* evidence before the jury. *Ib.*
3. A draft on a corporation was accepted by their agent, payable "when in funds," after a certain other draft upon them should have been paid. In an action on the draft, an auditor appointed to state the accounts between the drawer and the corporation, reported that the corporation "were in funds;" and it was held, that this was a statement of fact, within his province, and that his report was *prima facie* evidence of such fact. *Gould v. Norfolk Lead Company*, 338.

AWARD.

See ARBITRAMENT AND AWARD.

BAIL.

See DAMAGES, 4.

BAILMENT.

See CARRIERS, 1, 2, 3.

BANK.

See BILLS OF EXCHANGE, 1.

BEQUEST.

See WILL.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILLS OF EXCHANGE.

1. A bank which discounts a bill of exchange payable to the order of "A. B., Cashier," may maintain an action on such bill in its own name. *Barney v. Newcomb*, 46.

2. The purchaser for a valuable consideration of bills of exchange, drawn in pursuance of a written authority and a promise to accept by the drawee, purchasing on the faith of such authority and promise, may maintain an action in his own name against the drawee, upon the breach of such promise to accept. *Ib.*
3. One who is authorized to draw drafts on another, "at ten or twelve days," with nothing to indicate whether ten or twelve days *after date* or *after sight* is meant, may exercise his own discretion and consult his own convenience in that particular. *Ib.*

See EVIDENCE, 5, 7, 16, 17; LEX LOCI; PROMISSORY NOTES; WITNESS, 1.

BILL OF PARTICULARS.

After a case has been submitted to the jury under the charge of the court, a defendant, who has, throughout the trial, contested an item of the plaintiff's claim on its merits, will be held to have waived an objection which might have been taken at an earlier stage, that such item was not included in the plaintiff's bill of particulars. *Turner v. Twing*, 512.

BOND.

A bond to a creditor by a third person only, with condition like an ordinary prison bond, under the statute, though invalid as a statutory bond, is a good bond at common law. *Pratt v. Gibbs*, 82.

See ADMINISTRATION, 1, 2; LIMITATIONS, 1, 2.

BOOKS OF ACCOUNT.

1. Books of account, the entries in which were copied by one plaintiff from entries on a slate made by the other plaintiff, verified by the oath of both plaintiffs, are admissible in evidence. *Barker v. Haskell*, 218.
2. Account books are not incompetent, as of course, because the entries therein were not made on the same day that the charges were incurred. *Ib.*
3. In an action for work and materials, the plaintiff's books are admissible to prove work done by persons in his employment. *Ib.*

BOUNDARIES.

Under a statute by which a stream not navigable is made the boundary of an incorporated territory, the centre of the stream, and not the edge or margin is the true boundary line; and this is so although the monuments are described as standing on the margin or bank of the stream. *Cold Spring Iron Works v. Inhabitants of Tolland*, 492.

BURDEN OF PROOF.

See TRUSTEE PROCESS, 3.

BUSINESS, PLACE OF.

See TAX, 1.

BY-LAW.

See INSURANCE, 5, 6.

CARRIERS.

1. A railroad company, receiving upon its track the cars of another company placing them under the control of its agents and servants, and drawing them by its locomotive, over its own road, to their place of destination, assumes towards the passengers coming upon its road in such cars, the relation of common carriers of passengers, and all the liabilities incident to that relation. *Schopman v. Boston & Worcester Railroad Corporation*, 24.
2. The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such contract, are the same, whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company. *Id.*
3. The consignee of goods, who is ready to pay freight on having the goods delivered to him, may maintain trover against the carriers or their agents, who, having no legal claim on the goods for any thing besides the freight, refuse to deliver them, unless a further sum is first paid; the consignee, in such a case, is not bound to make any tender to those in possession of the goods, and their refusal to deliver the goods is evidence of a conversion *Adams v. Clark*, 215.

CASHIER.

See BILLS OF EXCHANGE, 1.

CHURCH.

1. A member of a congregational church, who is elected its treasurer, to receive and invest, in his individual name, the funds of the church, and who does so invest them, holds the funds as a trustee for the church, and is subject, as such trustee, to the jurisdiction of a court of equity. *Weld v. May*, 181.
2. The phrase, "or other similar officers," in Rev. Sts. c. 20, § 39, means officers of similar character and with corresponding functions with those of deacons in congregational churches, and church-wardens in episcopal churches. Other officers, such as a treasurer, not of a character similar to that of deacons, can hold property of the church only as trustees. *Id.*
3. A congregational church is neither a corporation nor a *quasi* corporation. *Id.*

COLLATERAL SECURITY

See GUARANTY, 1, 2.

COMMITMENT.

See PAUPER, 2; TRUSTEE PROCESS, 1.

COMMON CARRIERS.

See CARRIERS.

COMMON COUNTS.

See WORK AND LABOR, 1, 2.

COMMON SEWERS.

See DRAINS AND SEWERS.

CONDITION PRECEDENT.

See CORPORATION, 6; QUO WARRANTO.

CONDITIONAL ESTATE.

Where A. conveys to B. by deed, an estate upon condition, and at the same time B. mortgages the premises to A., who, on the non-payment of the mortgage debt at maturity, enters for foreclosure, and while he is in possession under such entry, a breach of the condition in his deed to B. occurs, such entry and possession, without further notice or act on the part of A., will not be sufficient to divest absolutely the estate of B. for such breach of condition. *Stone v. Ellis*, 95.

See DEED, 1; REDEMPTION.

CONFLICT OF LAWS.

See LEX LOCI.

CONGREGATIONAL CHURCH.

See CHURCH, 2.

CONSIDERATION.

See CONTRACT, 2; SUBSCRIPTION, 2.

CONSTRUCTION.

A written instrument, the true import of which is doubtful, and the intention of the parties to which cannot be determined from its language, will be construed most strongly against the person using the doubtful language, and in favor of him who has been misled and advanced his money upon it. *Barney v. Newcomb*, 47.

See COVENANT.

CONTRACT.

1. After the commencement of a contract of service between the plaintiff and the defendant, the former wrote to the latter: "I think it will be for the mutual advantage of all parties that either party have the liberty of annulling the contract by giving three months' notice of such intention in writing;" and again, as follows: "A few days ago, I addressed a note to you, in which I suggested the making an additional clause to our contract;" to which letters the defendants replied that they had "voted to accept the alteration or amendment proposed;" whereupon the plaintiff immediately wrote: "I refuse to agree to the proposition contained in your letter;" such correspondence does not amount to an alteration of the original contract, so as to justify a three months' notice by the defendants of their intention to terminate the contract, and a withholding of the plaintiff's salary after that time; the plaintiff's letters containing merely a suggestion or intimation. *Allcott v. Boston Steam Flour Mill Company*, 17.
2. A. agreed to carry B. in his vessel to California, if B., who was a carpenter, would do what work was necessary in preparing her for sea, and during the voyage. Before the vessel was ready for sea, A. refused to carry B., except on condition of his paying \$25 and signing the shipping papers. B. signed the papers, and, at the same time, gave the shipping master a note for \$25. On the day the vessel sailed, A. turned B. out of his vessel, giving as a reason the non-payment of the \$25. B. brought an action for a breach of contract, and it was held, that A. might show that the original parol agreement was, subsequently and before the sailing of the vessel, modified by further stipulations entered into between the parties, and that such modified agreement needed no new consideration to make it the basis of future liabilities between the parties; that it was a question for the jury whether the shipping agent had authority to take the note of B. for \$25, as cash, and so, whether the modified agreement had been fully performed by B. *Holmes v. Doane*, 135.
3. By the last will of A., his brother B. was appointed his executor, and named as the legatee of the surplus of his property after the payment of his debts. Letters testamentary were granted to B. who gave bonds with his two partners only as sureties. B. loaned \$5,000 of his brother's estate to the firm of which he was a member, and the firm subsequently failed. B. was removed from his trust as executor, and C. was appointed in his place. C. having obtained various choses in action belonging to A's estate from B., under the authority of the probate court, compromised with and released B.

as a debtor of the estate. The estate was subsequently represented insolvent, and commissioners were appointed to settle it. D., a creditor of the estate, whose debt remained unpaid, addressed a letter to B. respecting it; and B., in his reply, after setting forth in detail the condition of the estate said: "And now if I should have the ability, it will be the first act I shall perform, to place in their (the creditors') hands the amount which was lost by the firm of B. & Co., which would have paid to them not far from two thirds of their several claims." D. brought a suit against B. on this letter, alleging a promise by B. to pay D.'s claim against the estate, and it was held that the action could not be maintained. *Tucker v. Haughton*, 350.

4. Under an agreement between a city and certain individuals, that, if the former would widen a street to a certain width, the latter would pay a portion of the expense thereof; the widening of the street, accordingly, but allowing the second story of a building on such street to project beyond and over the line of the lower story, the highway having in all other respects been made of the stipulated width, will not defeat the right of the city to recover of such individuals the amount of their subscriptions. *City of Boston v. Simmons*, 373.
5. A. agreed to serve a flour company as the superintendent of their mill, for a fixed annual salary, "and five per cent on the net profits, after deducting the expenses of the company, and six per cent on the capital stock." It was further agreed between the parties, that "the percentage on the profits of the company shall be made up and paid accordingly once in each year, to commence when the books of the treasurer shall be made up to show the annual state of the company." A. entered the service of the company in July, 1846, and the mill was not fully in operation till January, 1847. In March, 1847, at an annual meeting of the stockholders of the company, a statement, which had been made up by the president and one of the treasurer's clerks, was exhibited, showing the assets and liabilities of the company, a statement of what wheat and corn had been bought and ground, and what had been sold. A. having brought an action for his percentage on the profits of the company, as appearing by such statement, it was held, that he could not recover, inasmuch as such statement was a mere "estimate," and was not such a making up of the books of the company as was contemplated by the agreement; and that A.'s percentage was intended by the agreement to be calculated upon the profits of an entire year. *Allcott v. Boston Steam Flour Mill Company*, 376.
6. The defendant agreed in writing to go to California with a mining company, as a substitute for the plaintiff, to work with the company two years, and to remit one half of his net earnings to the plaintiff, "at the expiration of the association." The company disbanded before the two years expired, and the plaintiff received his share of the profits to the time of dissolution. The defendant continued to labor in California on his own account, but refused to pay over any share to the plaintiff afterwards. Held, he was not bound to do so. *Goodell v. Smith*, 592.

See ASSUMPSIT; EVIDENCE, 1, 6, 7; RAILROADS, 4, 5; SUBSCRIPTION

CONTRIBUTION.

1. A suit in equity for contribution, brought by a member of a corporation, who has paid a debt of the corporation, against other members, cannot be maintained until the complainant has first applied and exhausted all property of the corporation bound to reimburse him. *Gray v. Coffin*, 192.

CONVERSION.

See CARRIERS, 3; TROVER.

CONVEYANCE.

See DEED; TRUST.

CORPORATION.

1. The provisions of the Rev. Sts. c. 89, § 53, as to the mode in which shares of a stockholder in a corporation may be sold for the non-payment of assessments, do not apply to the case of new shares offered to existing stockholders, and sold because not taken by them. *Sewall v. Eastern Railroad Company*, 5.
2. The assignees of an insolvent debtor, a portion of whose assets consists of shares in a manufacturing corporation, are not liable, either at law or for contribution in equity, to a creditor of the corporation, himself a member, under any of the statutes of this commonwealth, which render members of such a corporation personally liable for its debts; although the assignees attended meetings of the corporation and acted as stockholders. *Gray v. Coffin*, 192.
3. The personal liability of members of a corporation, in certain cases, for the corporate debts, depends solely on provisions of positive law, which are to be construed strictly. *Id.*
4. The provisions of St. 1838, c. 98, apply to all corporations, whether created before or after the passage of the act. The term "trustees," in that act, does not embrace "assignees" chosen under the insolvent law, St. 1838, c. 163, subsequently enacted. *Id.*
5. A suit in equity for contribution, brought by a member of a corporation, who has paid a debt of the corporation, against other members, cannot be maintained until the complainant has first applied and exhausted all property of the corporation bound to reimburse him. *Id.*
6. A., with others, signed a paper by which they agreed to pay the sums set against their respective names, towards the capital stock of a contemplated corporation, for which the charter had not then been obtained. By this paper it was stipulated that such capital stock should not be less than \$1,500,000. The charter was afterwards obtained, and the corporation organized, and at the first meeting of the subscribers, the capital was fixed at \$1,350,000. A. paid the first assessment on his five shares, four of which he afterwards transferred on the books of the company, and attempted to assign the fifth, but the corporation refused their assent, and brought an

action against him for unpaid assessments on such share; and it was held that the plaintiffs had not complied with the condition precedent upon which A.'s obligation to pay depended; and that neither the taking of his shares by A. nor his payment of one assessment constituted a waiver of the condition of his promise to pay, contained in the subscription paper. *Atlantic Cotton Mills v. Abbott*, 423.

7. The St. 1851, c. 315, § 1, requiring a summons to be left with a stockholder of a corporation, before his property can be taken on execution against the corporation, does not prescribe any change in the writ or declaration, from the form before adopted in a suit against such corporation. *Holyoke Bank v. Goodman Paper Manufacturing Company*, 576.
8. In an action against a corporation and some of its stockholders, seeking to charge them individually, mere irregularities in the mode of becoming stockholders cannot avail such individuals, if the corporation had waived such informalities, and recognized them as legal stockholders. *Ib.*
9. In such action, if the corporation admit its own liability by a default, a stockholder cannot in his own defence, even since the St. 1851, c. 315, deny such liability. *Ib.*
10. Where several stockholders in a corporation are summoned to answer in a suit against the corporation, pursuant to St. 1851, c. 315, § 1, and severally deny their liability, they are not entitled to a separate trial by different juries. *Ib.*

See ASSIGNEES; CHURCH; EQUITY, 1; MASTER AND SERVANT, 2; QUO WARRANTO.

COVENANT.

In a lease of a wharf, which, after describing the boundaries, proceeds thus. "being the same premises now in the occupancy of A. B., together with all the rights, privileges, and appurtenances to said wharf, and to the flats belonging thereto, or in any ways appertaining;" and which contains a covenant of quiet use and enjoyment; the words, "being the same premises now in the occupancy of A. B.," apply only to the wharf, and have no reference to what follows; so that the subsequent lawful filling up, by the proprietors of an adjacent wharf, of a portion of the intervening dock, constitutes no breach of covenant for which an action can be maintained. *Davis v. Atkins*, 13.

See ACTION, 10, 12; CONTRACT; ESTOPPEL, 3; GUARANTY; WAIVER, 1, 2.

CROSS EXAMINATION.

See EVIDENCE, 9, 19; WITNESS, 3.

DAMAGES.

1. In an action for damages, occasioned by the filling up by the defendants of their land, lying adjacent to that of the plaintiff, whereby the free flow of water off the plaintiff's land, as formerly existing, had been obstructed, instructions to the jury that "they should take into consideration the evi-

dence on both sides bearing on this point, and, if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular, they would, in assessing the damages, make an allowance for such benefit, and give the plaintiff such sum in damages as they found upon the evidence would fully indemnify and compensate him for all the damage he had actually sustained," are correct. *Luther v. Winnisimmet Company*, 171.

2. This court will not set aside a verdict on the ground of excessive damages, unless it evinces a mistake in principle, or the influence of partiality or prejudice. *Treanor v. Donahoe*, 228.
3. In two cross-actions tried together, one for the price of property sold, and the other for fraud in the vendor, the jury, if they find the fraud, and that the damages equalled or exceeded the purchase-money, may render a verdict for the defendant in the first action, and for the plaintiff in the second action for the excess of such damages, if any, over the purchase-money. If the damage is less than the price sued for, it should go in reduction of the price in the first action, and the verdict should be for the defendant in the second action. *Cook v. Castner*, 266.
4. In an action for taking insufficient bail, the measure of damages is the injury actually sustained by the judgment creditor; and evidence is competent, of the pecuniary condition of the debtor three months before he was liable to be taken in execution. *Danforth v. Pratt*, 318.
5. A., a deputy sheriff, levied an execution against B., on certain live stock and produce on a farm occupied by B. C. forbade the sale, claiming that all the property belonged to him, and, at the sale, he bid in most of the stock, including a certain cow. A. gave C. a bill of sale of all the property purchased by him, including this cow, but refused to take pay for the cow, excepting her in the receipt at the foot of the bill, and reciting that the price of her was tendered him by C. In an action of trespass brought by C. against A., to recover the value of the property sold by the latter, A. specified in defence that, after the sale, the cow was returned by him to C., and accepted by C. in full of all damages, if any, he was entitled to; and, a verdict having been rendered for C. for the value of the property including the cow, it was held that he could have judgment on this verdict only on condition that he should remit expressly on the record the price of the cow, and take judgment only for the balance. *Long v. Lamkin*, 361.
6. A. contracted under seal, to build a dam, according to the specifications and in the manner set forth in the contract, the last instalment of the price to be paid when the dam should be completed according to the contract. A., acting in good faith, and with an honest intention of fulfilling the contract, built a dam, though not according to the contract; it was held that he might maintain an action for work done and materials furnished, and that the jury should deduct from the contract price, so much as the dam built was worth less than the dam contracted for. *Gleason v. Smith*, 484.

See RAILROADS, 1, 2, 3.

DECLARATIONS.

See EVIDENCE, 3, 5, 8, 13, 25.

DEED.

1. A deed, containing the following clause: "The above premises are subject to a mortgage thereof, by me given to the Massachusetts Hospital Life Insurance Company, dated April 11, 1840, recorded with Suffolk Deeds, Lib. 454, fo. 179, to secure the payment of six thousand dollars, with interest; and are conveyed upon the condition that the said grantee, his heirs and assigns, do assume and pay the said mortgage debt, and all interest thereon, the same making part of the above consideration, and do indemnify and save harmless the said grantor, his executors and administrators, against the same forever," conveys the estate to the grantee as an estate upon condition in him and his assigns; and, if the condition be not performed, the grantor may enter for forfeiture of the estate, and the estate of the grantee may, by such breach of condition and entry, be wholly lost. *Stone v. Ellis*, 95.
2. H. conveyed by the following description: "A certain piece of land, wharf and flats, beginning at a point on the easterly side of Sea street, at the southwesterly corner of D.'s wharf, and from said corner running in a direction of about south sixty degrees east, bounded northerly on said D.'s wharf and flats, to the channel or low water-mark; then beginning again at said corner of D.'s wharf, and running south eleven degrees west by said Sea street one hundred and thirty-three feet; then turning and running in a direction of about south sixty degrees east (parallel with the northern boundary line on said D.) to the channel or low water-mark, and bounded southerly by other land and flats of me, the said H.; thence running northerly by the channel to the easterly end of said northern boundary line." The course of south sixty degrees east from the southwesterly corner of D.'s wharf coincided with the water line of said wharf for a considerable distance, at the end of which the line of the wharf turned and ran northerly about twenty feet, and then turned again and ran in a line nearly parallel with the first towards the channel. The true line between the flats of H. and the flats of D., commencing at the southwesterly corner of D.'s wharf, ran south forty-five degrees east to the channel. *Held*, that the northern boundary line of the premises conveyed followed the line of D.'s wharf to the first jog, and then struck the true line between the flats of D. and of H., and followed that line to the channel; and that the southern line of the premises conveyed was parallel with the northern line thus established; although both D. and H., at the date of this deed, supposed the true line between their flats to run from the southwesterly corner of D.'s wharf in a straight line to the channel; and although, by the construction given by the court, the southern line of the premises would run so far to the southward, that a small portion of its easterly end would cross flats not owned by the grantor. *Curtis v. Francis*, 427.
3. A. conveyed by deed to B., "a privilege to make a ditch from the north side of the north branch of the Hoosac River, and taking the water from the river for a factory below, to be taken out a buttonwood-tree six and one half rods easterly of said A.'s west line and the east line of land owned by said B., then north fifty-seven and a half degrees west, to the west line

of said A.'s lot, the ditch to be fourteen feet wide; with a privilege of building a dam across the river to take the water into said ditch, the dam not to be raised so high as to raise the dead water below the mouth of said A.'s ditch and above said B.'s dam at low water-mark:" *Held*, that the grantee acquired no right thereby to flow the land of the grantor without payment of damages. *Estes v. Wells*, 487.

See BOUNDARIES; MORTGAGE, 2; TRUST.

DELIVERY.

See STATUTE OF FRAUDS.

DEMAND.

If a special demand be not necessary to the maintenance of the action, it need not be proved, although directly alleged. *Rich v. Jones*, 329.

See PROMISSORY NOTES, 3; TROVER, 1, 2.

DEPOSIT NOTE.

See MUTUAL INSURANCE COMPANY.

DEVISE.

See WILL.

DISSEISIN.

See ESTOPPEL, 3; EVIDENCE, 21.

DISTRIBUTION.

See INSOLVENT ESTATE.

DRAINS AND SEWERS.

1. The statute of 1841, c. 115, in relation to main drains or common sewers, is a valid statute; and the by-laws of the city of Boston in relation to common sewers and drains, passed June 14, 1841, and March 7, 1844, (Charter and Ordinances of the City of Boston, 356,) are in conformity with that statute, and valid; and owners of vacant lots on a street in which a common sewer has been laid in pursuance of such by-laws, are properly assessed for their proportion of the cost thereof, as well as owners of lots built upon. *Wright v. Boston*, 233.
2. An order of the mayor and aldermen of Boston, directing a main drain to be laid, upon a petition setting forth that the safety and convenience of the city require such a drain, is a sufficient adjudication of the necessity thereof under the city by-laws. *Ib.*

DRAFTS.

See BILLS OF EXCHANGE, 3.

EMBEZZLEMENT.

See LARCENY, 1.

ENTRY OF ACTION.

See PRACTICE, 8, 9.

EQUITY.

1. Where a corporation, pursuant to an act of the legislature authorizing the issue of new stock, offered such stock to the existing stockholders, in the proportion of one share of the new for every four shares of the old stock held by them, on condition that the offer should be accepted within a certain time, and that the first instalment of one third of the price of such new stock should be paid at the time of subscribing therefor; one, not an actual stockholder, who purchases of certain stockholders their rights to take the new shares, and who subscribes for the proportion of the new stock to which such rights entitle him, within the time limited therefor, but fails to comply with the condition as to the payment of the first instalment, in consequence whereof the corporation sells the shares subscribed for by him as shares not taken, cannot, by a subsequent tender of the price of such new shares and interest, maintain a bill in equity against the corporation for the specific performance of an alleged contract; this court having no jurisdiction in equity of the case, whether the shares were sold by the corporation at private sale or at public auction. Nor can such a suit be maintained as a suit against a trustee for an improper sale of trust property. *Sewall v. Eastern Railroad Company*, 5.
2. A. mortgaged real estate to B., to secure the payment of a promissory note for \$600, payable in three years; B. assigned the mortgage and note to C., C. afterwards assigned them to D. as collateral security for a note for \$300, payable in thirty days. C. paid D. \$25 for his loan, and, at the maturity of the note of \$300, paid D. another \$25 for a renewal of it for thirty days, and, at the expiration of that time, a further sum of \$20 for a further renewal for sixty days. At the end of the sixty days, E., to whom C. had sold his interest in the mortgage and mortgage note, in consideration of \$275 in cash, and an agreement on the part of E. to discharge D.'s lien, tendered to D. \$325, and requested D. to deliver to him the mortgage and mortgage note. D. refused to do so, and E. filed a bill in equity, praying that D. might be decreed to deliver to him the mortgage and note, and to assign to E. the mortgaged premises free from all incumbrances made or suffered by D., and it was held that the court had no jurisdiction of the suit. *Mather v. Bennett*, 175.

ERROR.

See EXCEPTIONS; WRIT OF ERROR.

EQUITY OF REDEMPTION.

See REDEMPTION.

ESTOPPEL.

1. A. sold out his stock in trade to B., for a small sum in cash, and the balance in notes, secured by a mortgage of the goods. Four days afterwards, a part of the same goods was attached by the defendant, a deputy sheriff, on a writ against A., as his property. B., by his attorney, the plaintiff in this action, immediately commenced an action of trespass against the defendant for the goods. The action was defended on the ground that the sale to B. was in fraud of creditors and void, and a verdict was found for the defendant. Meantime A. filed his petition in insolvency, and in his schedule of assets were included the notes and mortgage above mentioned, but not the goods purchased by B. The plaintiff was chosen assignee of A., and, as such, and at the request of the creditors, brought back all the goods of B. which he had purchased of A., paying him therefor a certain sum in cash, and giving him up the notes and mortgage, and took a bill of sale of all the goods in the store, including those in the hands of the defendant. The plaintiff, as assignee, then demanded the goods of the defendant, and, on the defendant's refusal to deliver them, brought trover for their value; and it was held that he was not estopped by his having prosecuted the suit of B. against the defendant, from setting up the property in the goods to be in himself, as assignee of A. *Dudley v. Coburn*, 314.
2. A defendant in an action of trover, who has induced the plaintiff to believe when demanding the property that it was in his possession and control, is not thereby estopped in law from proving the contrary. *Jackson v. Pixley*, 490.
3. An adverse and exclusive possession of land for a period of twenty years is a good bar to a writ of entry to recover the same, although the demandant's title may have been derived through mesne conveyances from the tenant; nor is the tenant estopped, by his covenants of warranty in the deed to his original grantee, from setting up a subsequent title acquired by disseisin. *Stearns v. Hendersass*, 497.
4. A member of a school district who agrees with a committee of the district, to convey to the district a lot for a school-house, and delivers them a deed thereof, taking their note in payment, is estopped to deny the authority of the committee to accept such deed. *Case v. Benedict*, 540.

See FORMER JUDGMENT; WAIVER.

EVIDENCE.

1. Evidence is admissible, to show that the time of performance of a written contract within the statute of frauds, has been enlarged by a subsequent oral agreement. *Stearns v. Hall*, 31.
2. In an action against a town, for injuries received in consequence of a defect in a highway, the answer of a witness who was asked the condition of the road, that "there was a bad place at the side of the road; there had been a culvert put across. The condition of it was bad. At the mouth of the culvert, it was a steep right down; a culvert that I thought a dangerous

- place;" is admissible in evidence, as it describes the actual condition of the road within the personal knowledge of the witness, and is not an expression of opinion merely. *Lund v. Tyngsborough*, 36.
3. Where the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, form a part of the *res gestæ*, and are admissible in evidence. *Ib.*
 4. Declarations of a physician, made at the time of his examination of an injury, offered to show the nature and extent of the injury,—the examination itself, detached from the declarations being wholly unimportant and immaterial,—are inadmissible in evidence, not being a part of the *res gestæ*; although the physician be dead at the time of the trial. *Ib.*
 5. In a suit by the payee of a promissory note, against one who indorsed it in blank at the time it was given, parol evidence is admissible to show the real nature of the transaction. *Riley v. Gerrish*, 104.
 6. Parol evidence that a contract, signed by the plaintiffs jointly with the defendants, and apparently a joint undertaking by all the signers, was in fact signed by the plaintiffs as one party, and by the defendants as a second party, is inadmissible, as tending to contradict or control a written instrument. *Myrick v. Dame*, 248.
 7. In an action against A. and B. on a promissory note, signed by A. & Co., the point in issue being whether B. was a partner in the firm of A. & Co. at the date of the note, evidence that until A. commenced business under the firm of A. & Co., his credit was bad, is entirely irrelevant. *Dutton v. Woodman*, 255.
 8. In an action against two, as alleged copartners, evidence of statements and declarations, which would be admissible only upon the assumption of the existence of the copartnership, is incompetent to prove such copartnership. *Ib.*
 9. On the reëxamination of a witness, no questions can be put which do not relate to matters inquired into on the cross-examination. *Ib.*
 10. The fact sought to be established by the plaintiffs in a suit being the existence of a copartnership between the defendants, under a certain name, a judgment recovered by the same plaintiffs against the same defendants, as copartners, under such name, on a note given at the same time with the one in suit, is admissible though not conclusive evidence of that fact. *Ib.*
 11. In an action on a promissory note, against A. & B., as copartners, under the name of A. & Co., B. denying that he was a partner of A. at the date of the note, a letter written by a third party, who was a salesman and purchasing agent of A. & Co., to B., in which the writer said, that A. had stated to him that a copartnership had been formed between A. and B., and that he wrote to ascertain whether B. was "really responsible, as one of the partners, for the payment of the goods bought for this store," adding, "this proceeding is rendered necessary, from the fact that you will need, or, at least, do need now a credit, in order to carry on the business successfully," and "I write this with the knowledge of A.," which letter was never replied to by B.,—taken in connection with a subsequent conversation between the

writer and B., in which the letter was talked about, and B. was again asked by the writer, whether he was a partner in the firm of A. & Co., to which he replied, that he should neither admit nor deny it,—is competent evidence to be submitted to the jury, in connection with the other testimony, to prove the copartnership. *Ib.*

12. A shipwright who has examined a decayed vessel may give his opinion, founded on the condition of the timbers at the time of his examination, whether a person could have removed a part of the "thick streak" some months before, without discovering that the timber under it was decayed. *Cook v. Castner*, 266.
13. The general rule, that, where one makes a statement as received from another, and refers directly to that other, the former is not bound for the truth of the facts thus stated, is not applicable to the case of partners who are responsible for each other's statements in regard to their joint transactions. *Ib.*
14. In an action to recover the value of certain leather delivered to the defendant, by the plaintiff, to be made into shoes by the defendant, the plaintiff alleging a conversion of a portion of the leather, and the defendant averring that it had all been returned in the shoes manufactured; some of the defendant's witnesses having described leather which they supposed had been received by the defendant of the plaintiff, the defendant proposed to ask another witness, who was called as an expert, how much leather, such as described by the above witnesses, it would take to make a certain number of pairs of shoes; and it was held that the refusal of the judge to allow this question to be put was right, it not appearing that the witness had the means of forming the opinion desired. *Rich v. Jones*, 329.
15. An agent, acting under a parol authority, is a competent witness to prove his own agency. *Gould v. Norfolk Lead Company*, 338.
16. To prove the authority of an agent of a corporation to accept drafts for the company, it was proposed to introduce the agent's testimony that he had paid, as such agent, drafts and orders drawn on the company, and not previously accepted; and it was held, that, if such drafts and orders might be presumed still to exist, it was to be presumed that they were held by the company, and notice should first have been given to the company to produce them. *Ib.*
17. The payment of an unaccepted draft upon a corporation, by its agent, is no evidence of his authority to accept drafts upon the corporation; and the fact that such acceptor acted as general agent, has little tendency to show such authority. *Ib.*
18. A recorded vote of the directors of a corporation, being a written instrument, must be construed by its terms alone, with reference to the subject-matter to which it applies; and parol evidence is not admissible of the sense in which it was understood by a director. *Ib.*
19. A witness who is called to discredit another witness, and defeat the effect of his testimony, may be asked whether he has had a quarrel with such other witness. *Long v. Lamkin*, 361.
20. In an action of trespass against a deputy sheriff, to recover the value of the stock and produce of a farm which had been seized and sold by him

under an execution against A., the occupant of the farm, the plaintiff alleging that the stock and produce belonged to him, and had never belonged to A., and the record title to the farm being in the plaintiff and derived from sources wholly distinct from A., evidence that A. about the time of the conveyance of the farm in question to the plaintiff, had made fraudulent conveyances of other property to other persons than the plaintiff, is inadmissible for the defendant; nor can the title of the plaintiff to the property in question be affected by acts and sayings of A., made in the absence and without the knowledge of the plaintiff. *Id.*

21. In an action for the recovery of land, the defence to which is an adverse and exclusive possession for a period sufficient to constitute a bar under the statutes of this commonwealth, the declarations of a grantee of the premises, made more than twenty years before the commencement of the action, and subsequently to the date of his deed, that the entire title of the premises, at the time of such declarations, was in the tenant in such action, are competent evidence, as bearing upon the question of adverse possession in the tenant under a claim of right; but the declarations of such grantee, made after his insolvency and the conveyance of his interest in the premises to an assignee, and after twenty years' adverse possession by the tenant, are inadmissible. *Stearns v. Hendersass*, 497.
22. In a suit against one, proof may be given of a debt due from him and another jointly, there being no plea in abatement. *Scott v. Shears*, 504.
23. In an action against a surgeon, for negligently treating a fractured thigh bone, the defendant, in support of his allegation that he had placed the fractured limb upon a double inclined plane, at an angle of 45 degrees, or thereabouts, introduced a witness who testified to statements made in the presence of the plaintiff, by the defendant to the witness, at the time when the defendant brought the machine to the plaintiff's house, about the principle upon which the machine operated, and how it might be made a double inclined plane of any angle, by means of a screw. The evidence was admitted, and, on exceptions, the court held that, both as *res gestæ* and as a statement made in presence of the party, they could not say that it was erroneously admitted. *Moody v. Sabin*, 505.
24. A party's book of accounts is inadmissible, in this commonwealth, to prove cash payments above forty shillings in amount; nor is the application of the rule affected by the fact that an auditor at the hearing before him, has examined the book as a voucher. *Turner v. Twing*, 512.
25. A plaintiff, who declares upon and offers in evidence a written contract as his ground of action, cannot introduce the oral declarations of the defendant as to his supposed liability. *Goodell v. Smith*, 592.
26. A. was tried for maliciously burning a barn of B., and there was evidence implicating C. in the offence. To show malice on the part of C. towards B., the prosecution proved that he had, before the fire, commenced a criminal prosecution against B., on which the latter was discharged. Held, that A. could not show, in order to disprove malice, that such prosecution was founded on probable cause. *Commonwealth v. Vaughan*, 594.
27. Books of account, the entries in which were copied by one plaintiff from

entries on a slate made by the other plaintiff, verified by the oath of both plaintiffs, are admissible in evidence. *Barker v. Haskell*, 218.

28. Account books are not incompetent, as of course, because the entries therein were not made on the same day that the charges were incurred. *Ib.*

29. In an action for work and materials, the plaintiff's books are admissible to prove work done by persons in his employment. *Ib.*

See ARBITRAMENT AND AWARD, 8, 9; AUDITOR'S REPORT, 2, 3; LEASE, 2; MUTUAL INSURANCE COMPANY, 1; PARTNERS, 3; PROMISSORY NOTES, 3; PROPERTY; WITNESS.

EXCEPTIONS.

1. If a plaintiff excepts to the ruling of the judge, and afterwards amends his declaration changing the form of the action, and the issue to be tried, and the defendant obtains a verdict on the merits, the exception taken is no longer open to the plaintiff. *Cook v. Castner*, 266.

2. Where exceptions are taken to the admission of evidence, on the ground that it is irrelevant, if there be any one point, consistent with the facts in the bill of exceptions, to which it is applicable, the exceptions will be overruled. *Moody v. Sabin*, 505.

See INSOLVENT PROCEEDINGS, 1; PRACTICE, 7.

EXCESSIVE DAMAGES.

See DAMAGES, 2.

EXECUTOR'S SALE.

1. It is not essential to the validity of an executor's sale of his testator's real estate, for the payment of debts and legacies, under a license from the probate court, that he first obtain the appointment of guardians to all minors who are interested in the estate. *Holmes v. Beal*, 223.

2. One who has been in possession of real estate, under an executor's sale, for more than five years, the period of limitation established by Rev. Sta. c. 71, § 37, is not obliged, in an action to recover such real estate, to establish the validity of the executor's sale, before he can avail himself of the statutory bar. *Ib.*

EXECUTOR.

See ADMINISTRATION; ADMINISTRATOR; CONTRACT, 3.

EXECUTION.

See TRUSTEE PROCESS, 1.

EXPERT.

See EVIDENCE, 2, 4, 12, 14.

FELLOW SERVANT.

See MASTER AND SERVANT.

FILUM AQUÆ.

See WATERCOURSE, 5.

FIRE INSURANCE COMPANY.

See MUTUAL FIRE INSURANCE COMPANY.

FLATS.

See DEED, 2.

FLOWAGE.

If the verdict of a sheriff's jury, in a complaint for flowage, follows the statute substantially, though not verbally, it is a sufficient compliance with the terms of the law. *Shaw v. Mills*, 503.

See DEED, 3.

FORECLOSURE.

See MORTGAGE OF REAL ESTATE.

FOREIGN LAW.

See LEX LOCI.

FORMER JUDGMENT.

1. A judgment in a former action is conclusive, only when the same cause of action was adjudicated between the same parties, or the same point was put in issue on the record, and directly found by the verdict of the jury. *Gilbert v. Thompson*, 348.
2. In an action of replevin for a piano, a former judgment between the same parties in an action of trespass *quare clausum*, in which taking away the same piano was alleged by way of aggravation, is not conclusive; as title to the piano was then only indirectly involved. *Id.*

See EVIDENCE, 10; PARTNERS, 5, 6, 7.

FRAUDS, STATUTE OF.

A, the agent, in Boston, of the plaintiffs, doing business in Baltimore, received from the defendants a verbal order for a cargo of coal, to be shipped by the plaintiffs from Baltimore in a vessel drawing not more than ten feet of water, at a freight not over \$2.25 a ton. This order was duly forwarded by A, to the plaintiffs, and a cargo was shipped on board a vessel whose draught did not exceed ten feet. A bill of lading was forwarded to A, and

by him received in due course of mail, by which the cargo was consigned to A, or his order, for the defendants, and the freight was specified to be \$2.45 a ton. On the day the bill of lading was received, A indorsed it to the defendants, and delivered it to them, together with a bill of the coal, in which the price was reduced 20 cents a ton, to offset the increase of freight beyond the limits of the defendants' order. The defendants promptly sent back the bill of lading, and refused to receive the coal. On the passage from Baltimore to Boston, the vessel in which the coal had been shipped, foundered, but was raised and repaired, and arrived in Boston, whereupon A tendered the coal to the defendants, who refused to receive it. In an action for goods sold and delivered, in addition to the above facts, a usage of the coal trade between Baltimore and Boston was proved, by which, when coal is ordered in Boston from Baltimore, the delivery of it on board a vessel consigned to the person ordering it, was a compliance with the order, and the coal was thereafter at the risk of the party ordering it; but it was held, that there was, in this case, no actual or constructive acceptance and receipt of the coal by the defendants, to satisfy the statute of frauds. *Frostburg Mining Company v. New England Glass Company*, 115

See EVIDENCE, 1; RELEASE.

GENERAL AVERAGE.

See INSURANCE, 1, 2, 3.

GOODS SOLD AND DELIVERED

See STATUTE OF FRAUDS.

GUARANTY.

1. Where a promissory note is made payable in three years from date, and, after the expiration of that time, a party covenants that the note shall be paid "according to its tenor," the contract must be understood with reference to a note overdue, and the guaranty is equivalent to a stipulation for payment of a note payable on demand. *Crocker v. Gilbert*, 181.
2. The promisor, in a note, secured by mortgage of real estate, sold the equity of redemption, and, after the note became due, the purchaser guaranteed its payment under seal. The mortgagee subsequently took possession of the land for condition broken; and, in an action on the guaranty, it was held, that the guarantor might be called upon at once to pay the same, and the mortgagee was not bound to first apply the mortgage security. *Id.*
3. In an action on a guaranty indorsed on a promissory note, "that the within note shall be paid," the declaration alleged, that "the said A (the guarantor) has not paid said note and interest, but wholly neglects and refuses," &c., instead of averring that "the note had not been paid." This defect was held to be cured by a verdict, and to be no ground for an arrest of judgment. *Id.*

GUARDIAN.

See EXECUTOR'S SALE.

GUARDIAN'S BOND.

See LIMITATIONS, 1, 2.

HEARSAY.

See EVIDENCE, 3.

HUSBAND AND WIFE.

See MARRIED WOMAN.

INDICTMENT.

See LARCENY, 2.

INFANT.

See EXECUTOR'S SALE; MASTER AND SERVANT, 1

INFORMATION.

See QUO WARRANTO,

INSOLVENT DEBTORS.

See ASSIGNEES; ESTOPPEL, 1; PROMISSORY NOTES, 4.

INSOLVENT ESTATE.

1. A *bond fide* sale, for a valuable consideration, by one partner to another, of all the partnership effects, is valid, and the property so conveyed becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent. *Howe v. Lawrence*, 553.
2. By the insolvent law of this commonwealth, St. 1838, c. 163, § 21, the separate estate of partners must be first distributed to separate creditors, although there be no solvent partner and no joint estate, to which the joint creditors can resort. *Ib.*

INSOLVENT PROCEEDINGS.

1. Whether a defendant, who, during the pendency of a suit against him institutes proceedings in insolvency, shall have a delay of the trial of the action on that ground, and for how long a time, are matters resting entirely in the discretion of the judge before whom the action is pending; and to the exercise of such discretion no exception lies. *Barker v. Haskell*, 218.

- 2 Under the insolvent law of Massachusetts, a person whose claim against the insolvent estate has been formally allowed by the commissioner, but from which allowance an appeal has been taken and prosecuted according to law, is not a creditor, entitled to vote as a creditor, after such appeal has been taken and perfected, and before any judgment upon it has been rendered by the appellate court. *Betton v. Allen*, 382.

INSURANCE.

1. The distinguishing characteristic of a general average loss is, that it is voluntarily incurred by the owner of one of the subjects at risk, for the benefit of all; and the cutting away of the masts, with the consequent damage, are none the less general average charges, because the vessel was in ballast at the time, and therefore there was neither cargo nor freight to contribute. *Greely v. Tremont Insurance Company*, 415.
- 2 A general average loss is not to be added to the costs of repair, in order to show that such costs would exceed one half of the value of the vessel, so as to constitute a constructive total loss. *Ib.*
3. If the expenses of repairs upon a vessel, occasioned by a peril insured against, including general average charges, would exceed half the value of the vessel, the assured would not be entitled to recover of the underwriters for a constructive total loss, without regard to any discrimination between damages constituting a partial loss and general average loss; and such estimated cost would not constitute an actual total loss. *Ib.*
4. If a ship, after a disaster, remains in *specie*, under the control of the assured, and there is not, in fact, a total loss, independent of a sale by the master, such sale cannot make it so. *Ib.*
5. A by-law of a mutual fire insurance company, which requires a subsequent insurance on the same property to have "the consent of the directors signified by a statement thereof in the policy, or by indorsement thereon signed by the secretary," is not complied with by the approbation of one of the directors of the company, indorsed upon the plaintiff's application for insurance, which application states that "the applicant asks leave to insure \$1,000 on same property, in some other company; please signify the assent of the company in the policy." *Forbes v. Agawam Mutual Fire Insurance Company*. 470
6. And the company cannot be held to have waived a compliance with the above by-law, and the rights of parties are not altered, because the same person acted as agent for both companies in issuing the two policies, or because the first company, long after the obtaining of the second policy, notified the plaintiff of an assessment due from him, and accompanied such notice with a schedule of losses claimed of the company, in which the claim of the plaintiff was included, and marked "unadjusted." *Ib.*
6. In an action by a mutual insurance company against one of its members, for an assessment made on a deposit note, where the note itself recites the receiving of a policy, such recital is *prima facie* evidence that a policy has been issued; and it is no ground for a new trial, that only an abstract of the policy was introduced in evidence by the company. *New England Mutual Fire Insurance Company v. Belknap*, 140.

7. The promisor in a deposit note, given to a mutual insurance company at the time of taking out a policy, is estopped from setting up, in an action for an assessment made on the note, the want of an insurable interest in the property. *Id.*
8. An assessment may be made by a mutual insurance company on the whole amount of a deposit note, although the promisor has an insurable interest in a part only of the property covered by the policy. *Id.*
9. A mutual insurance company need not proceed, after every loss happening to it, to compute the assessments on its deposit notes requisite to meet such loss, but may adopt a rule of proceeding that will approximate as near as is practicable and reasonable to the above method. *Id.*

INSTANTANEOUS DEATH.

See ADMINISTRATOR, 1, 2, 3.

INTEREST.

By a contract A was to be paid for building a house for B, in thirty days after the work was completed. The house was not completed at the stipulated time, and B forbade further work. In an action by A to recover for the work actually performed, he was allowed interest after thirty days from the time he might have completed it, but for B's interference. *Bassett v. Sanborn*, 58.

See WITNESS, 1, 2.

ISLAND.

See WATERCOURSE, 2, 4.

JOINT-STOCK COMPANY.

See ACTION, 8.

JUDGE.

The question whether the application to a justice of the peace, under Rev. Sta. c. 20, § 35, to call a meeting of the proprietors of a meeting-house, was signed by five at least of such proprietors, as preliminary to the question of the admissibility of the records of such meeting, is for the judge and not for the jury. *Gorton v. Hadsell*, 508.

JUDGMENT.

See FORMER JUDGMENT; PARTNERS, 5, 6, 7.

JURISDICTION.

See CHURCH; EQUITY, 1, 2.

INDEX.

JURY.

See JUDGE; VERDICT, 2, 3, 4.

LANDLORD AND TENANT.

See LEASE.

LARCENY.

1. Evidence which proves an embezzlement under the statute will not sustain a general charge of larceny at common law. *Commonwealth v. King*, 284.
2. In an indictment for receiving stolen goods, it is not necessary to state by whom the larceny was committed; but, if alleged to be by A. B. it must be so proved. *Ib.*
3. If a servant appropriates to his own use bank bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny. *Ib.*
4. In an indictment against one for a larceny at common law, and against another for receiving the goods so stolen, if the evidence fails to prove the larceny by the former, the charge of receiving the stolen goods cannot be sustained against the latter. *Ib.*

See MARRIED WOMAN.

LAW AND FACT.

See JUDGE.

LEASE.

1. In a general lease of a store, or warehouse, there is no implied warranty that the building is safe, well built, or fit for any particular use. *Dutton v. Gerrish*, 89.
2. Where a contract of hiring contains no warranty, express or implied, that the premises are fit for the purpose for which they are hired, evidence is not admissible of the declarations of the lessor to that effect, made at the time of the hiring. *Ib.*
3. A clause in a lease that "the owner shall not be liable for any repairs on the premises during the term, the house being now in perfect order," has respect only to the condition of the house as an edifice in perfect repair, and not to the present or future purity of the air within it. *Foster v. Peyser*, 242.
4. In a sealed lease of a house for a private residence, there is no implied covenant that it is reasonably fit for habitation. *Ib.*

See COVENANT.

LEGACY.

See WILL.

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LETTERS.

See CONTRACT, 1.

LEX LOCI.

The rights of the parties to a bill of exchange, drawn by A. of New York on B. of Massachusetts, and afterwards purchased by C. of New York, who brings an action against B. for non-acceptance, are to be determined by the laws of Massachusetts. *Barney v. Newcomb*, 47.

See MORTGAGE OF PERSONAL PROPERTY, 3, 4.

LIMITATIONS.

1. The 26th section of Rev. Sta. c. 79, which limits actions on guardian's bonds, applies as well to a bond given on obtaining a license to sell real estate, as to the general guardianship bond; and by the term "discharged," in that section, is intended any mode by which the guardianship is effectually determined and brought to a close. *Loring v. Alline*, 68.
2. An action against the surety on a guardian's bond, which is commenced more than four years after the passing of the Rev. Sta., is barred by c. 79, § 26, although the bond was given and the guardianship discharged, before the statute went into operation. The statute relates to the remedy only, and is not retrospective. *Ib.*
3. If, by a decree in equity, certain debts are found to be due from the respondent to the petitioner, no action can be maintained against the respondent on the original causes of action, in consequence of any new promise which may be implied by such decree, unless it be brought within such time, subsequent to the date of the decree, as is prescribed by the statute of limitation applicable to such causes of action. *Phelps v. Brewer*, 390.
4. The judgment of a justice of the peace was rendered in 1827, and the defendant soon after left the commonwealth and resided elsewhere from that time till 1852, when an action of debt on the judgment was instituted; *Held*, that the action was not barred by any statute of limitations of this commonwealth. *Seymour v. Deming*, 527.

See EXECUTOR'S SALE; RAILROADS, 3; WRIT OF ENTRY, 4, 5, 6.

LUNATIC PAUPER.

See PAUPER.

MALICE.

See EVIDENCE, 26.

MARINE INSURANCE.

See INSURANCE, 1, 2, 3, 4.

MARRIED WOMAN.

Money sent to a married woman, for the support of herself and her children, by her husband, who has been three years absent at sea, is, in contemplation of law, his property, and must be so averred, when, in pleading, an averment of property is necessary. *Commonwealth v. Davis*, 233.

MASTER AND SERVANT.

- 1 A master or principal is not liable to one servant or laborer, for the neglect of another servant or laborer, in the same general business or employment; and the fact that the servant injured is a minor, does not at all affect his legal rights. *King v. The Boston and Worcester Railroad Corporation*, 112.
2. The obligation of a corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence. *Id.*

MEETING-HOUSE.

See PEWHOLDER.

MINORS.

See EXECUTOR'S SALE.

MONEY HAD AND RECEIVED.

See ACTION, 5, 7, 10.

MORTGAGE OF PERSONAL PROPERTY.

1. The owner of a vessel mortgaged one half of her to R., and subsequently mortgaged the whole of her to G. & S., expressly subject to R.'s lien. G. & S. effected an insurance on their interest, and, the vessel becoming a total loss, abandoned her to the underwriters; and it was held that R. was entitled to one half the salvage. *Rice v. Cobb*, 302.
2. An instrument, in form an indenture, executed by one party only, if it contains the requisite clauses to pass the property described, will operate as a deed poll. *Exxon v. Tarbell*, 407.
3. The record of a mortgage made and certified by a subordinate officer in the custom-house at Halifax, Nova Scotia, for the comptroller, is valid under St. 8 & 9 Vict. c. 85, § 7. *Id.*
4. A, the owner of a vessel, resident in Nova Scotia, mortgaged her to B, also resident there, who had his mortgage duly recorded, under the laws of the province, at the custom-house, and a memorandum thereof indorsed on the register of the vessel, these acts, by the *lex loci*, making B the owner of the vessel so far as was necessary to give him security for his debt; and it was held, that he had thus acquired the possession of the vessel sufficiently to enable him to maintain replevin against an attaching creditor here. *Id.*

See TRUSTEE PROCESS, 2.

MORTGAGE OF REAL ESTATE.

1. Where A conveys to B by deed, an estate upon condition, and at the same time B mortgages the premises to A, who, on the non-payment of the mortgage debt at maturity, enters for foreclosure, and while he is in possession under such entry, a breach of the condition in his deed to B occurs, such entry and possession, without further notice or act on the part of A, will not be sufficient to divest absolutely the estate of B for such breach of condition. *Stone v. Ellis*, 95.
2. The grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the condition annexed to his deed. *Ib.*

See GUARANTY; REDEMPTION.

MUTUAL INSURANCE COMPANY.

1. In an action by a mutual insurance company against one of its members, for an assessment made on a deposit note, where the note itself recites the receiving of a policy, such recital is *prima facie* evidence that a policy has been issued; and it is no ground for a new trial, that only an abstract of the policy was introduced in evidence by the company. *New England Mutual Fire Insurance Company v. Belknap*, 140.
2. The promisor in a deposit note, given to a mutual insurance company at the time of taking out a policy, is estopped from setting up, in an action for an assessment made on the note, the want of an insurable interest in the property. *Ib.*
3. An assessment may be made by a mutual insurance company on the whole amount of a deposit note, although the promisor has an insurable interest in a part only of the property covered by the policy. *Ib.*
4. A mutual insurance company need not proceed, after every loss happening to it, to compute the assessments on its deposit notes requisite to meet such loss, but may adopt a rule of proceeding that will approximate as near as is practicable and reasonable to the above method. *Ib.*

NEGLIGENCE.

See CARRIERS, 1, 2; EVIDENCE, 2, 3; MASTER AND SERVANT.

OPINIONS.

See EVIDENCE, 2.

PARTNERS.

1. If A receives partnership notes in payment of his demand against the firm, and after its dissolution opens a running account with the continuing part-

ner, by whose consent the amount paid by A to take up said notes, upon their dishonor, is charged in such running account, it is the duty of the jury, in a suit by A on such notes against the retiring partner, to apply any general payments made by the continuing partner to A after the notes are so charged, to the earliest items of debit in said account; and if the general payments so made are sufficient to extinguish the notes and all earlier items in the account, to find such notes were paid. *Allcott v. Strong*, 328.

- 2 The same rule applies to a suit by an indorsee of such notes taken when overdue. *Ib.*
3. A partnership must first be proved *aliunde*, before the declarations of one partner can affect the other; and evidence to show a continuance of a partnership, after it has been dissolved, with notice to the parties, must be as satisfactory as that required to show its establishment. *Ib.*
4. Two partners, subsequent to the filing of a petition by one of them, individually, for the benefit of the insolvent law, but prior to the first publication of notice, divided between themselves certain promissory notes, the property of the partnership, one of which, before such publication, was indorsed with the partnership name by the partner receiving it; and such indorsement was held to pass a valid title in the note, so as to enable a subsequent indorsee to maintain an action against the maker. *Mechanics' Bank v. Hildreth*, 356.
5. In a suit against a partnership, if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction; even though, by the *lex loci*, a service on the partner resident within the jurisdiction, is sufficient to authorize a judgment against all the partners. *Phelps v. Brewer*, 390.
6. The entry, by an attorney, of his general appearance for the defendants, in an action against a partnership, must be construed to be an appearance for the partners as partners, and for the purpose of defending the action against the partnership, and not as an appearance for the partners individually, severally, and personally, so as to render a judgment against the partnership, in such action, binding on an individual partner in another jurisdiction, by whom such appearance was not authorized. *Ib.*
7. One partner has no implied power to enter an appearance in a suit, except for the partnership, and cannot, by such appearance, bind a partner, personally and individually, who is not within the jurisdiction, and has not been served with process. *Ib.*
8. A *bonâ fide* sale, for a valuable consideration, by one partner to another, of all the partnership effects, is valid, and the property so conveyed becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent. *Howe v. Lawrence*, 553.
- 9 By the insolvent law of this commonwealth, *St. 1838, c. 163, § 21*, the separate estate of partners must be first distributed to separate creditors, although there be no solvent partner and no joint estate, to which the joint creditors can resort. *Ib.*

See ACTION, 8; EVIDENCE, 6, 7, 8, 10, 11, 13.

PARTIES.

See **BILLS OF EXCHANGE**, 1, 2.

PARTITION.

A petition for partition of real estate, under Rev. Sts. c. 103, cannot be granted, where the petitioner is seized of one moiety in his own right, and together with the respondents, as joint trustees with himself, of the other moiety, in trust for a third party. *Winthrop v. Minot*, 405.

PASSENGER CARRIERS.

See **CARRIERS**, 1, 2.

PAUPER.

1. A town, whose overseers of the poor send a lunatic pauper to the State Hospital, without an adjudication by any court or magistrate, may nevertheless recover their payments for his support, of the town of his legal settlement, under St. 1841, c. 77. *Inhabitants of Cummington v. Inhabitants of Wareham*, 585.
2. Such a sending is a "commitment" of the pauper within the meaning of that statute. *Ib.*
3. In an action for such expenses, by the town committing such lunatic pauper, against the town of his settlement, no recovery can be had for expenses incurred more than two years previous to the commencement of the action, nor more than three months previous to notice to the defendant town. *Ib.*

PAYMENT.

1. A conditional acceptance by a debtor of an order on him by a creditor, in favor of a third party, does not operate as a payment, especially if it be afterwards given up to the debtor by such third party unpaid. *Bassett v. Sanborn*, 58.
2. If a creditor applies to his debtor for payment, and he, by a written or verbal order, requests another to pay, who, whether bound to do so or not, does pay, it is a payment of the debt, and discharges the claim of the creditor. *Tuckerman v. Sleeper*, 177.

See **PARTNERS**, 1.

PEWHOLDER.

Unless a meeting-house, at the time it is torn down by a vote of the proprietors, is not only unfit for public worship, but so old and ruinous as to render its entire demolition necessary, a pewholder is entitled to indemnity for the destruction of his pew. *Gorton v. Hadsell*, 508.

PLEADING.

1. If a special demand be not necessary to the maintenance of the action, it need not be proved, although directly alleged. *Rich v. Jones*, 329.

2. A declaration contained four special counts, setting forth a contract that the plaintiff agreed to furnish to the defendant, leather to be manufactured into shoes, for which the plaintiff was to pay the defendant a certain compensation. One count alleged, as a breach of the contract, that a portion of leather the defendant had converted to his own use, contrary to the contract, whereby the same was wholly lost to the plaintiff. Another count averred a failure by the defendant to manufacture and return a part of the leather, either manufactured into shoes, or in any other way, and that the same was wholly lost to the plaintiff by reason of such breach of contract. Another count set forth that the defendant so negligently and unskillfully conducted himself in the business, that, by reason thereof, a portion of the leather was wasted and lost. The other count alleged a conversion of the leather by the defendant, by permission of the plaintiff, and an agreement, in consideration thereof, to pay the plaintiff the reasonable value thereof. It was held, that these were all proper counts in assumpsit, and that it was immaterial whether the breach was caused by tortious acts, which would have enabled the plaintiff to maintain an action *ex delicto*. *Ib.*
3. Money sent to a married woman, for the support of herself and her children, by her husband, who has been three years absent at sea, is, in contemplation of law, his property, and must be so averred, when, in pleading, an averment of property is necessary. *Commonwealth v. Davis*, 283.

See GUARANTY, 3; LARCENY.

POOR DEBTORS.

See BOND, 1.

POSSESSION.

See PROPERTY.

PRACTICE.

1. An objection to the declaration, that it failed to allege notice to the defendant of the non-payment of the note, even if such notice was necessary, comes too late after verdict. *Crocker v. Gilbert*, 131.
2. An objection that a declaration is defective should be taken either by a demurrer or a motion in arrest of judgment, and the point is not properly raised on the trial to the jury of the issues of fact. *Ib.*
3. Whether a defendant, who, during the pendency of a suit against him, institutes proceedings in insolvency, shall have a delay of the trial of the action on that ground, and for how long a time, are matters resting entirely in the discretion of the judge before whom the action is pending; and to the exercise of such discretion no exception lies. *Barker v. Haskell*, 218.
4. A creditor may prosecute an action against his debtor to final judgment, notwithstanding, after the action is commenced, the defendant institutes proceedings in insolvency, and the creditor offers the claim in suit for proof against the estate. *Ib.*
5. The filing of new counts, after an auditor has made his report, is no proof

that the trial at bar was of a different cause of action from that which appeared on the record when the auditor was appointed. No exceptions having been made to the filing of the new counts, it must be understood, in this court, that they were for the same cause of action as the original counts.

Rich v. Jones, 329.

5. An auditor, appointed under Rev. Sta. c. 96, in an action to recover the value of certain leather delivered to the defendant, to be made into shoes, and alleged to have been converted by him to his own use, may find, as a fact, whether any thing, and how much, is due from the defendant to the plaintiff; and his report on this question is *prima facie* evidence before the jury. *Ib.*
7. No exception can be taken to the refusal of a judge to allow the counsel for the defendant, on opening his case, to comment on the plaintiff's evidence. *Ib.*
8. Under St. 1851, c. 233, [since repealed,] a writ cannot be entered on motion, or by consent of parties, after the expiration of the two days prescribed by § 13 for such entry. *Kidder v. Browne*, 400.
9. A writ was made returnable to the court of common pleas, under St. 1851, c. 233, on the first Monday in February, and an order was passed, on the second day of the following March, in the court of common pleas, on the affidavit of the defendant, for its removal to this court; and it was held that "the next term" of this court at which, under St. 1840, c. 87, such action must be entered, was not the term which commenced on the same second day of March on which the order for removal was passed, but the next subsequent term. *French v. Barnard*, 403.

See BILL OF PARTICULARS; CORPORATION, 10.

PREScription.

No period less than twenty years will give to an owner of land any rights by prescription or adverse user against an adjacent owner, deriving title from the same grantor. *Luther v. Winnisimmet Company*, 171.

See ESTOPPEL, 8; EVIDENCE, 21; WRIT OF ENTRY.

PRESUMPTION.

See PROPERTY.

PRINCIPAL AND AGENT.

See EVIDENCE, 15, 16; MASTER AND SERVANT.

PROMISSORY NOTES.

1. If a party, not the indorsee, places his name in blank on a note, before it is negotiated or passed, the holder may fill up the blank so as to charge such indorser as a joint and several promisor and surety. *Riley v. Gerriak*. 104.

2. In a suit by the payee of a promissory note, against one who indorsed it in blank at the time it was given, parol evidence is admissible to show the real nature of the transaction. *Ib.*
3. In an action against the maker of a promissory note, payable at a place certain, no demand at that place need be proved. *Carter v. Smith*, 321.
4. Two partners, subsequent to the filing of a petition by one of them, individually, for the benefit of the insolvent law, but prior to the first publication of notice, divided between themselves certain promissory notes, the property of the partnership, one of which, before such publication, was indorsed with the partnership name by the partner receiving it; and such indorsement was held to pass a valid title in the note, so as to enable a subsequent indorsee to maintain an action against the maker. *The Mechanics' Bank v. Hildreth*, 356.

See **BILLS OF EXCHANGE**; **GUARANTY**, 1, 2, 3.

PROPERTY.

1. Ownership of personal property once proved, is presumed to continue until an alienation is shown; merely parting with the possession is not conclusive evidence of a change of title. *Magee v. Scott*, 148.
2. Possession of personal property with the consent of the true owner, does not raise a legal presumption of title against such owner. *Ib.*

QUO WARRANTO.

1. An information in the nature of a *quo warranto*, under *St. 1852, c. 312, § 42*, will not lie against a railroad company in behalf of a stockholder, merely because the corporation issued stock below the par value, and began to construct their road before the requisite amount of stock was subscribed; it not appearing that the petitioner's private right or interest was thereby put in hazard. *Hastings v. Amherst and Belchertown Railroad Company*, 596.
2. The charter of The Amherst and Belchertown Railroad Company, *St. 1851, c. 277*, does not require the northern terminus of the southern section of the road to be in the "village" of Amherst; and taking land in said town, for a route not terminating in either village of that town, is not the exercise of a franchise not granted the company, within the prohibition of *St. 1852, c. 319, § 42*. *Ib.*

RAILROADS.

1. A railroad corporation, which proceeds under *Rev. Sts. c. 39, § 67*, after notice to the mayor and aldermen of a city, and on terms agreed upon between the corporation and the mayor and aldermen, to raise a street, that its railroad may pass under the same, acts by virtue of its independent corporate powers, and not as the agent or servant of the city; and such corporation is primarily liable, to third parties, for damages thereby caused

to their estates. *Gardiner v. Boston and Worcester Railroad Corporation*, 1.

2. A bond of indemnity taken by the city, and the appointment of a superintendent to take care of the public interests in the execution of this work during its progress, are prudent measures, which do not change the character of the work, or the general liability of the company. *Ib.*
3. The time within which damages arising from such a proceeding must be claimed, is limited to three years by Rev. Sta. c. 39, § 58. *Ib.*
4. A railroad company, receiving upon its track the cars of another company, placing them under the control of its agents and servants, and drawing them by its locomotive, over its own road, to their place of destination, assumes towards the passengers coming upon its road in such cars, the relation of common carriers of passengers, and all the liabilities incident to that relation. *Schopman v. Boston and Worcester Railroad Corporation*, 24.
5. The contract created between a railroad company and a purchaser of one of its tickets, and the rights and liabilities of the parties to such contract, are the same, whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company. *Ib.*
6. A master or principal is not liable to one servant or laborer, for the neglect of another servant or laborer, in the same general business or employment; and the fact that the servant injured is a minor, does not at all affect his legal rights. *King v. Boston and Worcester Railroad Corporation*, 112.
7. The obligation of a railroad corporation, so far as respects those in their employment, does not extend beyond the use of ordinary care and diligence. *Ib.*
8. The St. 1845, c. 191, which provides for the appointment of commissioners to fix the compensation which shall be paid by one railroad corporation for the drawing of its passengers, merchandise, and cars over the railroad of another company, does not infringe upon any rights which the latter company may have under its charter to regulate tolls on its own road; neither is it a valid objection to the appointment of such commissioners, in any instance, that the parties agree as to the compensation to be paid for the carriage of passengers, and the petition asks for a commission merely to fix the rate for freight. *Vermont and Massachusetts Railroad Company v. Fitchburg Railroad Company*, 369.

See CARRIERS, 1, 2; EQUITY, 1; QUO WARRANTO.

REAL ACTION.

See ESTOPPEL, 3; EVIDENCE, 21; WRIT OF ENTRY.

RECEIVING STOLEN GOODS.

1. In an indictment for receiving stolen goods, it is not necessary to state by whom the larceny was committed; but, if alleged to be by A. B., it must be so proved. *Commonwealth v. King*, 284.

2. If a servant appropriates to his own use bank bills, obtained by him at a bank, on a check drawn by his master, it is an embezzlement, and not a larceny. *Ib.*
3. In an indictment against one for a larceny at common law, and against another for receiving the goods so stolen, if the evidence fails to prove the larceny by the former, the charge of receiving the stolen goods cannot be sustained against the latter. *Ib.*

REDEMPTION.

The grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee, files his bill to redeem, a breach of the condition having occurred, will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the condition annexed to his deed. *Stone v. Ellis*, 95.

RELEASE.

A release by two of three joint obligees is a bar to a suit by the third, brought in the name of the three, for one third of the benefit of the contract. In such joint action the plaintiffs cannot set up that such release was a fraud on one of their number, and thus deprive the defendant of a legal defence to the claim of the three. *Myrick v. Dame*, 248.

RENTS AND PROFITS.

See WRIT OF ENTRY, 4.

REPLEVIN.

See MORTGAGE, 4; *Esson v. Tarbell*, 407.

RESCISSION.

See CONTRACT, 1.

RES GESTÆ.

See EVIDENCE, 3.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT.

RIPARIAN PROPRIETORS.

See DAMAGES, 1; PRESCRIPTION; WATERCOURSE, 2, 3, 4, 5.

RIVER.

See BOUNDARIES; WATERCOURSE.

SALE.

See STATUTE OF FRAUDS.

SALVAGE.

See MORTGAGE OF PERSONAL PROPERTY, 1.

SAVINGS BANKS.

The Provident Institution for Savings in Boston, although chartered in 1816, is nevertheless subject to the general laws of the Commonwealth, passed since that time, relating to the investments of deposits by Savings Banks and Institutions for Savings. *Opinion of the Judges*, 604.

SCHOOL DISTRICT.

See ESTOPPEL, 4.

SCIRE FACIAS.

See TRUSTEE PROCESS.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

See PARTNERS, 5, 6, 7.

SEWERS.

See DRAINS AND SEWERS.

SHAREHOLDERS.

See CORPORATION.

SHERIFF'S JURY.

See FLOWAGE.

SHIPS AND SHIPPING.

The owner of a vessel mortgaged one half of her to R., and subsequently mortgaged the whole of her to G. & S., expressly subject to R.'s lien. G. & S. effected an insurance on their interest, and, the vessel becoming a total loss, abandoned her to the underwriters; and it was held that R. was entitled to one half the salvage. *Rice v. Cobb*, 302.

See INSURANCE, 1, 2, 3, 4.

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STOCKHOLDERS.

The personal liability of members of a corporation, in certain cases, for the corporate debts, depends solely on provisions of positive law, which are to be construed strictly. *Gray v. Coffin*, 192.

See CORPORATIONS.

SUBSCRIPTION.

1. E., with others, subscribed a paper, promising to pay a certain sum each to the treasurer of a society, for the purpose of erecting a new meeting-house; the society erected the same, on the faith of the funds subscribed; E. was one of the building committee, and participated in these acts of the society, as one of its members and officers; and the meeting-house was completed and occupied by the society; held, that the treasurer of the society could maintain an action against E. to recover his subscription. *Watkins v. Eames*, 537.
2. It seems, also, that if a number of subscribers promise to contribute money on the faith of the common engagement, for the accomplishment of an object of interest to all, and which cannot be accomplished save by their common performance, the mutual promises constitute a reciprocal obligation in law. *Ib.*

See CORPORATION, 6.

SUPPLEMENTARY OATH.

See BOOKS OF ACCOUNT.

SURVIVORSHIP.

See ADMINISTRATOR.

TAX.

- . L. & R., booksellers and publishers in B., owned a building in C., which

was leased by them to B. & H., printers, and N. & R., bookbinders. B. & H. contracted to do all L. & B.'s printing, so far as they were able, and N. & R. their binding; but L. & B. had printing and binding done at other establishments. L. & B. had stereotype plates and paper stored at C., in fire-proof buildings on the same lot of land with the above-mentioned building, B. & H. having a right to enter and take out the plates whenever they had occasion to use them for printing. L. & B. paid a tax in the city of B for personal property of the firm, and L. also paid a personal tax in C. where he resided. The City of C. imposed a tax on the stereotype plates and paper stowed there, and it was held to be illegal, L. & B. having no "place of business" at C. within the meaning of Rev. Sts. c. 7, § 13. *Little v. Cambridge*, 298.

2. A person is liable to be taxed in the town where he resides, on the first day of May, although he and his estate may be set off to another town by a special statute, before the assessment is completed, and the tax bill delivered to the collector. *Harman v. New Marlborough*, 525.

See ACTION, 7, 8; DRAINS AND SEWERS.

TROVER.

1. In trover, a demand and refusal is evidence of a conversion, conclusive if not rebutted, or explained. *Magee v. Scott*, 148.
2. The consignee of goods, who is ready to pay freight on having the goods delivered to him, may maintain trover against the carriers or their agents, who, having no legal claim on the goods for any thing besides the freight, refuse to deliver them, unless a further sum is first paid; the consignee, in such a case, is not bound to make any tender to those in possession of the goods, and their refusal to deliver the goods is evidence of a conversion. *Adams v. Clark*, 215.
3. A defendant in an action of trover, who has induced the plaintiff to believe when demanding the property that it was in his possession and control, is not thereby estopped in law from proving the contrary. *Jackson v. Pizley*, 490.

See CARRIER, 3; ESTOPPEL, 1.

TRUST.

1. A., being seised of an estate in fee, by his deed, dated December 26, 1777, conveyed to B. and others, and the survivor of them, as joint tenants, but without words of limitation to their heirs or to the heirs of the survivor, in trust to and for the use of a Lodge of Freemasons, to the only proper use, benefit, and behoof of the lodge forever. A., by his last will, gave all his real and personal estate to his children and grandchildren, and, at the death of one of the sons, his share of A.'s estate descended to the plaintiff. The plaintiff brought an action to recover her undivided part of the estate conveyed to the lodge; but it was held, that the conveyance was in trust, and the estate did not descend to the heirs of the grantor. *King v. Parker*, 71

See EQUITY, 1; WILL, 5, 6

TRUSTEES.

See ASSIGNEE; CHURCH.

TRUSTEE PROCESS.

1. A trustee who refuses to deliver on the execution, any goods, &c., of the principal debtor, or to pay any money, is liable to a *scire facias*, although the principal debtor was committed on execution. *Cheney v. Whitely*, 289.
2. A mortgagee of a vessel, who takes possession for breach of condition, under the laws of Maine, the right of redemption having expired, and receives from the master the freight money of a voyage just completed, agreeing to pay all outstanding bills against the vessel, and who afterwards procures insurance on her, "for whom it may concern, payable to himself in case of loss," is not chargeable by the trustee process, in an action against the mortgagor, for any portion of the insurance money received by him, the vessel having become a total loss; but is chargeable for any balance of freight money remaining in his hands after the payment of bills, as agreed, such freight money having been earned while the vessel was allowed to remain in the possession of the mortgagor. *Rice v. Brown*, 308.
3. A person summoned as trustee is to be charged or not, according as, on a just view of all the facts, the weight of evidence and of conviction shall fairly preponderate; and if it be not affirmatively proved by the answers of the alleged trustee, or by the collateral proofs, that he is chargeable, then he is to be discharged. *Porter v. Stevens*, 530.

VERDICT.

1. When the instruction to the jury is such that the ground upon which the verdict was rendered cannot be ascertained, it must be set aside. *Holmes v. Doane*, 135.
2. This court will not set aside a verdict on the ground of excessive damages unless it evinces a mistake in principle, or the influence of partiality or prejudice. *Treanor v. Donahoe*, 228.
3. Partiality and misconduct of a juror in the jury-room cannot be shown by the testimony of the juror himself or of the other jurors. *Cook v. Castner*, 266.
4. It is not every mere cause of challenge, which, if made at the time, would set aside a juror, which is sufficient ground, afterwards, to set aside the verdict. *Ib.*

See FLOWAGE.

WAIVER.

1. If a party, who is, by his covenant, bound to receive a deed from another, makes specific objections to the deed, this is a waiver of all others which are of such a nature that, if stated by the party, they might have been obviated by him who was to deliver the deed. In such case, if the objection taken

is removed, the others are to be treated as waived. *Gerrish v. Norris*, 167

2. In an action for a breach of covenants entered into by the plaintiff and defendant, for mutual conveyances of land, the defendant having refused to accept the deed tendered to him by the plaintiff, by reason of specific objections to the deed taken by him at the time of the tender, it is correct for the judge to instruct the jury that, if the defendant used language intended and calculated to convey to the plaintiff the idea that he waived all other objections, he would be estopped from setting up other objections. *Ib.*

See BILL OF PARTICULARS; CORPORATION, 8; EXCEPTIONS, 1;
INSURANCE, 6.

WARRANTY.

See LEASE.

WATERCOURSE.

1. To constitute a watercourse from one tract of land into another, there must be something more than a mere surface drainage over the entire face of the first tract on to the second, occasioned by unusual freshets or other extraordinary causes. *Luther v. Winnisimmet Company*, 171.
2. If the course of a river not navigable, changes, and cuts off a point of land on one side, making an island, such island still belongs to the original owner. *Trustees of Hopkins Academy v. Dickinson*, 544.
3. In such case, if the old bed of the river, being gradually deserted by the current, fills up, and new land is formed, such newly-formed land belongs to the opposite riparian proprietors respectively, to the thread of the old river. *Ib.*
4. And if new land be formed in the river above said island, independent of the island, and not by a slow, gradual, and insensible accretion to it, such new land above belongs to the opposite riparian proprietors respectively to the *filum aquæ*, or thread of the river. *Ib.*
5. The thread of the river in such case would be the medium line between the shores or natural water-lines on each side at the time the new land was formed, without regard to the channel or deepest part of the stream. *Ib.*

See BOUNDARIES; DAMAGES, 1.

WAY.

See EVIDENCE, 2.

WILL.

1. H., by will, gave his wife, for life, the use of his dwelling-house and of all his plate and furniture; also an annual income arising from an investment of \$40,000; and to W. R. H. and F. H. H., grandsons, \$1,000 each, to be paid when they should be twenty-one years of age; but if they, or either, should not live so long, the bequest to them to belong to the testator's chil-

dren; to S. H. and B. F. H., and seven other children, each one ninth of his estate, real and personal. He then directed that the said \$40,000 should remain invested thirty years after his wife's decease, the income to be equally divided among his nine children, or their heirs; and that, after the decease of his wife, all his real estate should be sold. After the decease of the widow, the executor sold the real estate and furniture, and filed a bill in equity, for direction in the construction of the will. *Held*, that the clause directing that the investment of the \$40,000 should remain for thirty years after the wife's decease, was void; that the gift of the testator's "estate, real and personal," one ninth to each of his children, embraced the reversion expectant on the determination of the widow's life estate in the \$40,000, and also the proceeds of the real estate sold by the executor. *Hooper v. Hooper*, 122.

1. S. H., one of the sons, died after his father, the testator, but in the lifetime of the widow, intestate and without issue; his share of one ninth was decreed to be paid to his personal representative. *Ib.*
2. B. F. H., one son, died before the testator, without issue and intestate. *Held*, that his legacy of one ninth lapsed and fell into the general estate, and should be distributed as intestate estate, and that the two grandsons would take the share of their deceased father therein by right of representation. *Ib.*
4. F. H. H., one of the grandsons, died intestate and without issue after the testator's death; his portion of his deceased father's share was directed to be paid to his personal representative, to be administered according to law. *Ib.*
5. Under a will, by which all the residue and remainder of the testator's estate is given to trustees, in trust to pay over and distribute the income to and among his five children, one fifth to each, during their respective lives, with remainder over, such children are entitled to their respective proportions of the income of such residue from the decease of the testator. *Loving v. Minot*, 151.
6. Under a will, by which the testator gives all his property in trust, with power to the trustees to sell and re-invest, and to make partition and division of the same, and to pay to the beneficiaries the income of the respective shares assigned to them, if the property remains undivided, each beneficiary is entitled to his proportion of the income actually earned by the trust fund, whether it exceeds six per cent. or not. *Ib.*
7. A determination expressed by a testator, in a codicil to his will, to make an alteration in the will in one particular, negative by implication any intention to alter it in any other respect. *Quincy v. Rogers*, 291.
8. A testator, by his last will and testament, gave to A., B., and C., a legacy of \$2,000 each, and also to each an equal share with others named in the residue of his estate. By a codicil, which recited that his intention in respect to the legacies to A., B., and C. was not carried into effect by his will, he provided as follows: "I, therefore, in this particular, declare my will to be, that the sum of \$6,000 shall be taken by" A., B., and C., "or those of them who shall survive me, they to share alike; but if all these persons shall die in my lifetime, then the said sum shall sink into the residue of my

estate. I declare this provision for said legatees to be in lieu of, and as a substitute for, that made in their behalf by the aforewritten will, and this writing shall be taken as a codicil thereto, hereby ratifying said will in all other particulars;" and it was *held*, that this codicil did not revoke the residuary gift in the will to A., B., and C. *Id.*

9. A testator bequeathed as follows: "Also to my grandson, T. P. E., son of N. E., deceased, the sum of \$2,000, when he becomes twenty-one years of age; and also unto my four granddaughters, H. P., M. L., C. A., and S. M., daughters of the aforesaid N., the sum of \$1,000 each, at twenty-one years of age; and I furthermore will and decree the above-mentioned grandchildren be supported during their minority, each out of the legacy which I have bequeathed them." By a subsequent clause in the will, after repeating the bequest to T. P. E., he proceeded: "I also give and bequeathe unto my granddaughters, H. P., M. L., C. A., and S. M., daughters of N., deceased, the sum of \$1,000 each, when they severally become of age, excepting what may be necessary for their support during their minority;" and it was *held*, that the grandchildren took vested legacies, so that on the death of S. M., before attaining the age of twenty-one years, her administrator was entitled to maintain an action for such portion of her legacy, with interest, as had not been paid over for her use in her lifetime. *Eldridge v. Eldridge*, 516.
10. When the language of a will is equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself, or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent. *Id.*
11. A testator gave and bequeathed as follows: "Unto my eldest son, M. B., his heirs and assigns, my farm that he now lives on, with all the stock now on said farm that belongs to me, also all my farming tools on said farm, by his paying the following sums as hereafter directed; 1st. To my son, D. B., one hundred dollars a year for seven years, without interest, the first payment to be in one year from my decease," &c.; and it was *held*, that upon the acceptance by M. B. of the devise to him, the legacy to D. B. vested, so that, on the death of D. B. before the expiration of the seven years, his administrator could recover the payments for the years that remained. *Bowker v. Bowker*, 519.

WITNESS.

1. In an action by the purchaser of a bill of exchange in New York, against the drawee in Massachusetts, for non-acceptance, the drawer, who also resides in New York, is a competent witness for the plaintiff; his liability in damages to the plaintiff, under the laws of New York, in the event of the failure of the plaintiff to maintain the action, being too remote and contingent an interest to exclude him. *Barney v. Newcomb*, 47.
2. In an action of assumpsit, a person in the employ of the plaintiff, whose compensation is fixed at a certain percentage of net profits, is rendered a competent witness for the plaintiff by a release of all interest in the amount which may be recovered in the suit; it not, having been made to

appear, by examination of the witness on the *voir dire* or otherwise, that the plaintiff, if he should lose his case, would have a legal right to charge the costs and expenses thereof on the general fund, and thus diminish the compensation of the witness. *Rich v. Jones*, 329.

3. A witness may be discredited by evidence that he has made a different statement on a former occasion, although the precise language then used by him cannot be shown; and he need not be first asked, whether he has ever testified differently. But such previous statement cannot be used to prove the facts to be as then stated by the witness. *Gould v. Norfolk Lead Company*, 388.
4. In an action to recover back usurious interest paid, the original debtor is a competent witness, under Rev. Sta. c. 85, § 4. *Gifford v. Whitcomb*, 482.

WORK AND LABOR.

1. A. agreed under seal to build a house for B., but the work not being completed at the stipulated time, B. directed A. to discontinue, and the contract was not completed. It was held, nevertheless, that A. might recover upon the common counts for work and labor, &c., deducting all damages to B. from the failure of A. to comply with the contract. *Bassett v. Sanborn*, 58.
2. The fact that payment was to have been in part by real estate, will not prevent A. from recovering on the common counts, especially as the true value of the land was not over estimated in the original contract, and B. had refused to convey it in part payment for the work actually performed. *Ib.*
3. By the original contract, A. was to be paid in thirty days after the completion of the work; held, that he might recover interest in such action after thirty days, from the time he might have completed it, but for the interference of B. *Ib.*

See BOOKS OF ACCOUNT.

WRIT OF ENTRY.

1. A title, acquired by the tenant, without the concurrence of the demandant, after the commencement of a real action, although pleaded at the first term after it is acquired, will not bar the demandant; especially when it is merely a title under a mortgage, even if the tenant has given the demandant notice that he is in possession for the purpose of foreclosure. *Curtis v. Francis*, 427.
2. In a real action brought by C., the owner of a strip of flats running from the upland to the channel, against F., his coterminous proprietor on the south, to recover a portion of flats, a judgment and opinion of the court rendered in favor of D., the coterminous neighbor of C. on the north, upon a statement of facts, upon which two real actions, brought by D. against C. and F. respectively, to recover portions of their flats, were submitted to the court, with power to determine the boundary lines, upon the evidence introduced by either party, and to draw such inferences of fact as a jury might draw, is admissible in evidence of the boundary line between D. and

- C. at that time, on proving by oral evidence that it has not been changed since. *Ib.*
3. When the judge, on the trial of a real action to recover a parcel of flats, instructs the jury, at the request of the tenant, that it may be shown, by occupation and conveyances, that the proprietors of the flats in question had agreed that the dividing lines between their estates should run in a certain direction, and that upon such evidence the jury may presume releases and conveyances between said proprietors, establishing such line, since lost; the tenant cannot except because the judge, at the same time, called the jury's attention to the peculiarity of the law in relation to the ownership of flats, that there can be no disseisin of them but by actual occupation, as affording a ground of improbability that any such agreement, releases, or conveyances have been made. *Ib.*
 4. Under the provisions of the Rev. Sta. c. 101, the rents and profits to be recovered upon a writ of entry are to be computed from six years before the date of the writ to the time of the verdict. *Ib.*
 5. An adverse and exclusive possession of land for a period of twenty years is a good bar to a writ of entry to recover the same, although the demandant's title may have been derived through mesne conveyances from the tenant; nor is the tenant estopped, by his covenants of warranty in the deed to his original grantee, from setting up a subsequent title acquired by disseisin. *Stearns v. Hendersass*, 497.
 6. In an action for the recovery of land, the defence to which is an adverse and exclusive possession for a period sufficient to constitute a bar under the statutes of this commonwealth, the declarations of a grantee of the premises, made more than twenty years before the commencement of the action, and subsequently to the date of his deed, that the entire title of the premises, at the time of such declarations, was in the tenant in such action, are competent evidence, as bearing upon the question of adverse possession in the tenant under a claim of right; but the declarations of such grantee, made after his insolvency and the conveyance of his interest in the premises to an assignee, and after twenty years' adverse possession by the tenant, are inadmissible. *Ib.*
 7. The demandant, in a writ of entry, who shows a possession prior in time, is entitled to recover against a tenant who shows no title to the premises, but merely possession at the time of suit brought; although such demandant may be a wrongdoer as to the real owner. *Hubbard v. Little*, 475.

See ESTOPPEL, 2, 3; EVIDENCE, 21.

WRIT OF ERROR.

The St. 1851, c. 87, relates to writs of error on past as well as future judgments; and such a construction does not make it an *ex post facto* act *Jacquins v. The Commonwealth*, 279.

USHER A. MOREN
ATTORNEY-AT-LAW

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